



**DEPARTMENT OF TRANSPORTATION**

**4910-9X**

**Office of the Secretary**

**49 CFR Part 29**

**[Docket No. DOT-OST-2018-0104]**

**RIN 2105–AE71**

**Tribal Transportation Self-Governance Program**

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (DOT or Department) is issuing this final rule to establish and implement the Tribal Transportation Self-Governance Program (TTSGP or Program) pursuant to section 1121 of the Fixing America's Surface Transportation (FAST) Act. Representatives of Tribes and the Federal Government negotiated the rule in accordance with the Negotiated Rulemaking Act. The Program will afford Tribes participating in the Program greater control and decision-making authority over their use of certain DOT funding for which they are eligible recipients while reducing administrative burdens. These regulations include eligibility criteria, describe the contents of and process for negotiating self-governance compacts and funding agreements with the Department, and set forth the roles and responsibilities of and limitations on the Department and Tribes that participate in the Program.

**DATES:** This rule is effective October 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mr. Sean Poole, Director of Intergovernmental Affairs, Office of the Secretary, (202) 366–4573 or via e-mail at [sean.poole@dot.gov](mailto:sean.poole@dot.gov), or Ms. Krystyna Bednarczyk, Office of the General Counsel, (202)

366-5283, or via email at krystyna.bednarczyk@dot.gov. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. Authority for This Rulemaking**

These regulations implement section 1121 of the Fixing America's Surface Transportation (FAST) Act, Public Law (Pub. L.) 114–94, which was enacted on December 4, 2015, and is codified at 23 U.S.C. 207 (Section 207). This section directs the Secretary of Transportation (Secretary) to establish and carry out the TTSGP at the Department. It also directs the Department to develop regulations to implement the Program pursuant to the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*, adapting the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Tribes. The purposes of Section 207 are to establish the TTSGP to transfer eligible Federal funding for transportation-related programs to participating Tribes and to facilitate Tribal control over the delivery of Tribal transportation programs, services, functions and activities (PSFAs). Section 207 incorporates by reference select provisions of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended, 25 U.S.C. 5301 *et seq.* (ISDEAA).<sup>1</sup> Congress enacted ISDEAA to promote effective and meaningful participation by Tribes in the planning, conduct, and administration of Federal programs and services for Tribes. ISDEAA authorizes Tribes to enter into self-determination contracts and self-governance compacts with the Departments of the

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<sup>1</sup> Following enactment of the FAST Act, Congress transferred the ISDEAA provisions within title 25 of the U.S. Code. The docket contains a table that provides the relevant provisions and their current citations.

Interior and Health and Human Services to assume operation of direct services for Tribes and administrative functions that support the delivery of these services by these Departments without regard to the agency or office within which the activity is performed.

Implementation of the TTSGP through this rule will maintain and improve the Federal Government's unique and continuing relationship with and responsibility to Tribes, without diminishing the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, laws, and court decisions, and permit each eligible Tribe to choose the extent of its participation in the TTSGP. It will implement a process for Tribes to establish eligibility and negotiate an alternative funding mechanism by executing a compact and funding agreement with the Department, provide Tribes with control over the implementation of Tribal PSFAs, and, where permitted by Section 207 and consistent with other statutory authorities, authorize Tribes to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities. Finally, the TTSGP will reduce administrative burdens on Tribes carrying out PSFAs.

## **B. Negotiated Rulemaking Process**

### **1. Development of the Proposed Rule**

Section 207(n) directs the Secretary to develop the regulations consistent with the Negotiated Rulemaking Act and to adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes. Section 207(n) restricts membership of the TTSGP negotiated rulemaking committee ("Committee") to Federal and Tribal

government representatives. The Federal Highway Administration (FHWA), on behalf of the Department, published a *Federal Register* notice (81 FR 24158) on April 25, 2016, announcing the intent to establish the Committee and soliciting nominations for membership on the Committee. The Department published a *Federal Register* notice (81 FR 49193) on July 27, 2016, announcing the formation of the Committee, and identifying 23 Tribal representatives and 7 Federal representatives.

The first Committee meeting was held in Sterling, VA on August 16–18, 2016, during which the Committee negotiated protocols, a set of written procedures under which the Committee would operate.<sup>2</sup> The Committee held a total of 12 meetings in different locations throughout the country, including meetings hosted by the Sac and Fox Nation, Citizen Potawatomi Nation, Absentee Shawnee Tribe, Poarch Band of Creek Indians, Salt-River Pima Maricopa Indian Community, and the Morongo Band of Mission Indians.<sup>3</sup> The Committee members and technical advisors organized themselves into two work groups and used the Committee meetings to develop draft materials and exchange information. The Committee’s meeting minutes and any materials approved by the Committee were made a part of the record.

There were no Committee meetings between December 2016 and January 2018, during which time, the Office of the Secretary assumed responsibility for the rulemaking. The Department published a *Federal Register* notice (82 FR 60571) on December 21, 2017, announcing a Committee meeting in January 2018. The Committee reconvened in

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<sup>2</sup> Documents adopted by the Committee, including the Protocols and meeting minutes, are available at <https://www.transportation.gov/self-governance/committee>.

<sup>3</sup> The December 2016 meeting did not achieve a quorum of Committee members due to inclement weather and subsequent flight cancellations. Those present participated in the established work groups to continue to develop and review proposed regulatory language, and the Committee adopted that work product at the January 2018 meeting.

Sterling, VA on January 8-12, 2018. The Committee discussed a draft document that consolidated the products of the Committee work groups. A one-day Committee meeting followed in February 2018. These meetings were intended to gather information from the Committee to clarify areas of disagreement, identify the issues that the Committee had yet to discuss or propose text, and ensure the Federal members understood how the negotiated provisions on which the Committee previously reached consensus reflected statutory mandates.

Next, the Committee met in Washington, D.C. at Department headquarters on June 18–19, 2018. In advance of the meeting, the Department distributed a revised discussion draft, and a crosswalk comparison of the January and June 2018 drafts, for consideration by the Committee. The Tribal representatives attended the June 2018 Committee meeting but raised several objections. They asserted that the draft submitted to the Committee had not been prepared mutually through a negotiated process involving both the Department and Tribal representatives. On June 19, 2018, the Tribal representatives suspended negotiations based on their objections. Therefore, the Committee did not approve any meeting minutes or documents.

Concurrent with its decision to suspend negotiations, the Tribal representatives submitted a letter<sup>4</sup> to the Department proposing new timelines to conclude negotiations and setting forth a number of requests and conditions that must be met before the Tribal representatives would agree to resume negotiations. To meet the statutory time frame for publication of a draft and final rule, the Department declined the request of Tribal representatives to delay publication of the draft rule. However, Committee negotiations

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<sup>4</sup> The letter is available in the docket.

resumed after enactment, on August 14, 2018, of Pub. L. 115–235, which extended the statutory deadline for the Department to issue the proposed rule and final rule.

At the request of the Tribal representatives, the Department retained the services of the Federal Mediation and Conciliation Service (FMCS), a neutral third party, to facilitate subsequent negotiations. The Department and the Tribal representatives subsequently worked through their differences with the assistance of FMCS, including the disagreement issues.

In October 2018, the Tribal representatives submitted to the Department a revised discussion draft for the Committee’s consideration. With assistance from FMCS, the Committee resumed negotiations in Washington, D.C. on October 29–November 3, 2018. At the recommendation of FMCS, the Committee appointed a drafting subcommittee, composed of nominated Committee members and technical advisors, to develop recommendations and draft regulatory text for consideration by the Committee. The Committee directed the work of the drafting subcommittee.

Between November 2018 and February 2019, FMCS convened the drafting subcommittee virtually and in-person in Washington, D.C. to develop recommendations and proposed regulatory text for the Committee’s negotiation. After consulting with the Designated Federal Officer (DFO) and the Tribal Co-Chairs, FMCS convened the Committee in Shawnee, OK on March 18–19, 2019, followed by a two-day drafting subcommittee meeting on March 20–21, 2019. During the Committee meeting, the Committee reached tentative agreement on several proposed regulatory sections and provided additional direction to the drafting subcommittee. Finally, the Committee

authorized FMCS and the drafting subcommittee to continue to negotiate additional recommendations and to propose regulatory text addressing the remaining topics.

FMCS convened the drafting subcommittee in Washington, D.C. on April 1–4, April 23–26, and May 20–23, 2019, to develop the remaining provisions of the draft rule for the Committee’s consideration. After consulting with the DFO and the Tribal Co-Chairs, FMCS convened the Committee in Scottsdale, AZ on June 3–6, 2019. At the meeting, the drafting subcommittee presented the proposed regulatory text to the Committee, identified a limited number of areas of disagreement that remained outstanding, and provided recommendations and preferred language addressing these areas of disagreement, whether in regulatory text or in draft preamble text for the proposed rule. The Committee reached tentative agreement on most of the rule and provided additional direction to the drafting subcommittee on the outstanding provisions. The Committee authorized the drafting subcommittee to complete the draft rule for the Committee’s review and agreement.

The drafting subcommittee met in Washington, D.C. on June 25–26, 2019, to complete its work. On June 26, 2019, FMCS facilitated the subcommittee’s briefing of the Committee on the draft rule. The Committee reached consensus on the draft rule, including the description of the disagreement items discussed in this section. The Tribal Co-Chairs and the DFO confirmed the Committee’s consensus determination to submit the draft rule to the Department.

## **2. Public Comment and Tribal Consultation**

The Department published the notice of proposed rulemaking (NPRM) in the *Federal Register* on October 2, 2019 for a 60–day comment period. 84 FR 52706. In the

NPRM, the Department announced three Tribal consultations and a virtual listening session, consistent with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*. The Department held four public information, education, and consultation meetings during the public comment period to explain the rule, answer questions, and take oral testimony. The first took place on October 21, 2019, during the National Congress of American Indians' Annual Convention in Albuquerque, NM. The second was held on November 5, 2019, at the United South and Eastern Tribes Annual Meeting in Choctaw, MS. The third meeting occurred on November 19, 2019, at a Federal Aviation Administration facility in Des Moines, WA. At all three consultations, the Department presented on the proposed rule, answered questions, and took comments. Transcripts of each of these consultations are posted in the docket. On November 21, 2019, the Department held a virtual listening session via webinar. The closed captioning record of the virtual listening session is posted in the docket. Finally, after the comment period closed, on December 5, 2019, a Department representative held an information listening session at the 29th Annual Bureau of Indian Affairs (BIA) Tribal Providers Conference in Anchorage, AK.

### **3. Development of the Final Rule**

At the direction of the Committee, the drafting subcommittee reconvened on February 3–6, 2020, in Washington, D.C. The drafters reviewed the public comments and developed recommended changes to the proposed rule for consideration by the Committee. The Committee reconvened in Cabazon, CA on March 3–5, 2020. The drafting subcommittee presented the proposed final rule for the Committee's review, and the Committee reached consensus on the final rule.



## **II. Summary of Comments on the Proposed Regulations and the Final Rule**

This section summarizes each subpart of the Department's regulations to implement the TTSGP, and describes the comments received on the proposed rule and the Department's response to those comments. The Department received written and oral comments from 14 Tribes, a consortium of 19 Tribes, and several individual Tribal members; a non-profit organization representing small and independent business members; 3 intertribal organizations, representing many Tribes across the United States; 2 law firms that represent Tribes nationwide; a consortium of 5 State departments of transportation; and a transit agency. The Department reviewed and carefully considered all public comments received, including those received after the comment period closed.

Except for four areas of disagreement discussed in this section, the proposed regulations are the product of consensus developed by the Committee through interest-based negotiations.

The Tribes, Tribal organizations, and law firms expressed general support for the rule and the Tribal views on the areas of disagreement. Comments on specific sections or topics are summarized and responded to in this section. Additionally, the Department received several questions in the Tribal consultations that were outside the scope of this rulemaking.

The Department made minor edits, including consistency changes, throughout the final rule to improve clarity. The Department aligned the questions in the section titles and the answers in the regulatory text. When referencing funds in a funding agreement, the proposed rule used two phrases inconsistently. The final rule uniformly uses the phrase "included in a funding agreement." The final rule changes the term "parties" to

“the Department and the Tribe.” Finally, the Department revised regulatory statements from passive voice to active voice.

**A. Subpart A—General Provisions**

This subpart sets forth the purpose and authority of these regulations, Departmental policy, effect of these regulations on existing Tribal rights, the Department’s obligation to consult with self-governance Tribes, and definitions. It states the prospective effect of these regulations and addresses the relationship between a participating Tribe’s existing Tribal Transportation Program (TTP) agreement entered into under the authority of 23 U.S.C. 202, and a compact and funding agreement. Finally, it addresses the effect of 23 U.S.C. 207 on requirements contained in Departmental regulations, program guidelines, manuals, or policy directives.

The Department received one comment from a non-profit organization requesting the addition of a new paragraph to § 29.1, which addresses the purpose and authority for part 29, to impose a limitation on cross-border Tribes’ use of funds based on geography. The commenter noted that 23 U.S.C. 207 is silent on the issue of extraterritorial application, and the Department declines to adopt the proposed revisions because limitations on the use of specific funds under the Program, including for cross-border Tribes, are addressed by the statutes specific to the funding source.

The Department edits § 29.1 for clarity in the final rule, striking the last sentence in proposed § 29.1(a) regarding funds that may be included in a funding agreement since this is addressed in § 29.400. The Department also revises paragraph (b) to clarify the source of the negotiated rulemaking procedures by referencing the Negotiated Rulemaking Act.

The Department makes minor revisions in the final rule to § 29.2 regarding Departmental policy. Specifically, the final rule reflects the statutory language in paragraph (d) and rephrases paragraph (f) to active voice.

A commenter and a Tribal consultation attendee inquired whether a Tribe could participate in the Program at any time or whether there was an expiration date for participation. The Department revises in the final rule § 29.3(a) to clarify that a Tribe may apply at any time. The Department received comments from three Tribes and a law firm expressing support for including in the final rule the Tribal rights set forth in § 29.3(b) and the applicability of Departmental circulars, policies, manuals, guidance or rules other than those in part 29, as set forth in § 29.4. The commenters encouraged the Department to reduce regulatory burdens to Tribes through a liberal interpretation of this rule, citing the general lack of Tribal resources and staff. The Department acknowledges the comment and did not make any changes in the final rule.

The Department received comments from three Tribes and a law firm encouraging the Department to retain § 29.7 in the final rule. This provision addresses existing TTP agreements, clarifying that the TTSGP has no effect on existing or future TTP agreements, but that a Tribe cannot have both a TTP agreement and TTP funds included in a funding agreement under the Program. The Department retains this provision with no changes in the final rule.

The Department revises in the final rule § 29.8 regarding situations where more than one party purports to be the authorized representative of a Tribe to add “if necessary.” This change clarifies that the Department may not need to defer negotiations or execution of documents in all cases.

Section 29.9 sets forth the definitions applicable to part 29. The Department received comments from three Tribes, a Tribal organization, and a law firm supporting the use of terms with which Tribes operating under ISDEAA are familiar. They and a Tribal member also urged the Department to use an alternative term for “Chief” in the title “Chief Self-Governance Official.” The Department agrees with the recommendation and removes “Chief” from the title in the final rule.

The Department received several questions regarding eligibility for the Program. Section 207 and this final rule make clear that Indian Tribes, including Tribal organizations, and Tribal consortia are eligible to participate in the Program on behalf of their member Tribes. As set forth in the definition of Indian Tribe or Tribe in § 29.9, when a Tribe has authorized a consortium to carry out Tribal PSFAs on its behalf, the consortium has the same rights and responsibilities as the authorizing Tribe.

The Department revises the definitions of “compact” and “funding agreement” in the final rule to clarify that they are entered into pursuant to “this part” as well as 23 U.S.C. 207. The proposed rule sometimes, but not consistently, referred to compacts and funding agreements “under this part” or “under the Program.” The Department removes these inconsistent references in the final rule. The Department revises the definition of “discretionary or competitive grant” to clarify the term as used in part 29.

The Department received comments from three Tribes, a Tribal organization, and a law firm supporting the definition of “programs, services, functions, and activities” or “PSFAs.” One Tribe requested that the Department clearly define the term PSFAs, but did not make any suggestions on how to revise the definition. The Department does not make any revisions to the PSFA definition in the final rule. This definition clarifies that

the Department does not deliver PSFAs on behalf of Tribes; rather, Tribes carry out PSFAs using the six categories of funding eligible to be included in a funding agreement between the Department and the Tribe.

**B. Subpart B—Eligibility and the Negotiation Process**

This subpart sets forth the eligibility requirements for a Tribe, Tribal organization, or Tribal consortium (collectively “Tribe” in the final rule) to participate in the Program. Consistent with Section 207, § 29.100 requires Tribes to demonstrate financial stability and financial management capability, and transportation program management capability to be eligible to participate in the TTSGP. The Department revises paragraphs (a)(2), (b), and (c) in the final rule to clarify that the Department’s determination is based on the evidence submitted by the Tribe.

Consistent with the proposed rule, § 29.100(b) provides three standards by which Tribes may demonstrate financial stability and financial management capacity. First, the regulation sets forth Section 207’s conclusive evidence standard. Second, § 29.100(b)(2) provides a sufficient evidence standard for Tribes subject to the Single Audit Act that currently carry out transportation projects, programs, or services through the TTP or a DOT grant award and have no uncorrected significant and material audit exceptions in their required single audits. Tribes that meet the sufficient evidence standard are well placed to participate in the DOT self-governance program—they conduct audits under the Single Audit Act, demonstrate that they do not have material and significant audit exceptions, and demonstrate transportation experience. While TTP agreements are “in accordance with the ISDEAA,” Tribes are subject to Federal oversight when they administer TTP funds. Tribes plan, budget, prioritize, and otherwise manage their Tribal

transportation programs. The sufficient evidence standard recognizes that Tribes that successfully implement TTP agreements and successfully manage grants for the maintenance, rehabilitation, and construction of transportation facilities should receive the benefits Congress intended in enacting the TTSGP.

The Department received comments from two Tribes and two law firms expressing support for the Department's inclusion of a sufficient evidence standard and requesting clarification that the Department intends to implement the sufficient evidence standard in the same manner as the conclusive evidence standard. The Department makes edits to paragraph (b)(2) to clarify that this is the case.

Third, the regulation provides a means for Tribes without a mandate to comply with the Single Audit Act that currently conduct business with DOT to demonstrate financial stability and financial management capability. Unlike the other two standards, this is a discretionary determination made by the Department. This option is consistent with FHWA practice in administering the TTP, provided the Tribe demonstrates financial capacity. FHWA has long permitted Tribes not subject to the Single Audit Act to enter into a TTP agreement, provided they undergo an independent audit and provide evidence demonstrating no uncorrected significant and material audit exceptions. DOT has determined that some smaller-funded Tribes have worked well with DOT under TTP agreements, as well as under the Federal Transit Administration's (FTA's) Tribal Transit Program. The Department does not want to compel those Tribes to join a consortium to be eligible for the TTSGP, and there is no requirement in the final rule for such Tribes to do so. In the final rule, the Department clarifies the meaning of independent audit to be one that is consistent with 2 CFR 200.514, reorganizes the subparagraphs to be

sequential, and moves the provision on technical assistance to paragraph (e) since it is inapplicable to the evidence for demonstrating financial stability and financial management capability.

Several Tribes and the commenting law firms expressed support for the Department's approach to the financial stability and financial management capability criterion, in particular the inclusion of the sufficient evidence standard and discretionary standard. One Tribe asked that the Department clarify that, if a Tribe meets the sufficient evidence standard, it has met the financial stability and financial management capability criterion. The Department makes edits to paragraph (b)(2) to make clearer that this is the case.

Paragraph (c) of § 29.100 describes the evidence the Department would consider in making the discretionary determination that a Tribe has demonstrated transportation program management capability to be eligible to participate in the Program. As noted in the proposed rule, the Department will evaluate the totality of the evidence presented in support of the eligibility application. The Department makes clarifying edits to paragraph (c) to state this explicitly in the final rule.

One Tribal commenter requested that the Department accept as eligible Tribes that already participate in self-governance programs with the U.S. Department of the Interior (DOI) or Indian Health Service (IHS). The Department acknowledges the commenter's concern. However, this approach is inconsistent with Section 207, which sets forth the specific eligibility criteria. Section 207 does not provide an automatic entry into the Program for self-governance Tribes that participate in programs with other Federal agencies. However, many existing self-governance Tribes likely would satisfy

the financial stability and financial management capability criterion under the conclusive evidence standard with three years of clean audits, and evidence of their successful management of their transportation programs. Another commenter asked whether a Tribe demonstrates transportation program management capability if it uses a consultant to assist it in carrying out transportation services. Under § 29.100(c), the Department will examine evidence of a Tribe's transportation program management capability on a case-by-case basis, considering the totality of the evidence a Tribe submits. The Department recognizes that Tribes have a right to choose how they structure their programs and personnel.

Paragraph (d) of § 29.100 sets forth the time frames related to eligibility determinations. The final rule changes the time frame for the Department to notify the Tribe that it received the submission and whether any additional evidence is necessary from 15 to 30 days, because the Department determined it needs more time to assess whether any additional evidence is necessary. The final rule also eliminates the duplicate reference to the time frame for the Department to notify a Tribe regarding the sufficiency of their systems and standards, as this is addressed in paragraph (b)(3)(ii).

Paragraph (e) of § 29.100 provides for technical assistance, to the extent the Department has the resources and expertise, to Tribes that do not meet the financial stability and financial management capacity criterion due to uncorrected significant and material audit exceptions. Where the audit exceptions relate to a contract, agreement, grant, or other funding mechanism between the Tribe and another Federal agency, the Tribe will resolve those exceptions with that agency. The Department revises paragraph (c) in the final rule to make this clear.



The Department notes that DOI operates the DOI Tribal Self-Governance Program pursuant to title IV of ISDEAA, as amended (codified at 25 U.S.C. 5301 *et seq.*), and jointly administers the TTP with FHWA. This subpart does not alter, affect, modify or otherwise change the eligibility requirements under 25 U.S.C. 5362, or implementing regulations at 25 CFR part 1000, for a Tribe or Tribal consortium seeking to participate in the DOI Tribal Self-Governance Program. Nothing in this final rule shall be construed to diminish or otherwise affect the authority of the Secretary of the Interior to carry out and administer the DOI Tribal Self-Governance Program. Additionally, this subpart does not alter or otherwise effect existing TTP contracting options available to Tribes with DOI.

Finally, this subpart describes the negotiation process a Tribe must follow to enter into a compact and funding agreement with the Department to participate in the TTSGP. Some Tribes and the law firms supported the simple and flexible process and the clear time frames in their comments. The final rule clarifies the timing for negotiating an amendment in § 29.101 and for negotiating compacts, funding agreements, or amendments in § 29.102. It also clarifies in § 29.107 that the Department and a Tribe should resolve negotiation disagreements informally.

### **C. Subpart C—Final Offer Process**

This subpart sets forth the final offer process that a Tribe may invoke during negotiation with the Department of a compact or funding agreement if they cannot agree on certain terms and conditions. It is the Department's intent that a Tribe should only use the final offer process when there is a negotiation impasse and not before the parties have fully explored an area of disagreement. This subpart also sets forth the Department's

responsibilities in processing a final offer, the grounds for rejecting the Tribe’s final offer, and the Tribe’s rights to challenge an adverse decision by the Department related to the final offer.

The Department received comments from two Tribes, a Tribal organization, and a law firm expressing support for the Department’s approach in subpart C. The commenters supported the clear time frames, final offer process, and clarity in § 29.213 that the Department and a Tribe may still execute and implement the non-disputed portions of a compact or funding agreement. The Department revises § 29.213 in the final rule to change “remaining” provisions to “any non-disputed, severable” to align with similar language in § 29.911, and adds “not already executed” to further clarify that there could be non-disputed provisions already in place.

The Department makes some minor edits for clarity throughout the provisions in subpart C. The Department revises the timing for transfer of funds in § 29.208 to cross reference to the appropriate transfer of funds provisions in §§ 29.403 through 29.405, rather than set forth the timing in this provision. The Department notes that the final rule revises the timing for transfer of funds in these provisions from 30 to 10 days, as discussed in section II.E. Finally, the Department clarifies the response in § 29.211 regarding when the Department must provide technical assistance. The NPRM stated conflicting timing—upon receipt of the final offer and upon rejection. Consistent with 25 U.S.C. 5387(c)(1)(B), which is incorporated by 23 U.S.C. 207(l)(2), the final rule states that technical assistance is provided upon rejection of a final offer.

#### **D. Subpart D—Contents of Compacts and Funding Agreements**

This subpart identifies what is included in compacts, funding agreements, and amendments; the duration of such agreements; and the rights and responsibilities of the Department and a Tribe. One law firm supported the Department's flexible approach, noting, in particular, the absence of a model compact and funding agreement.

Section 29.307 addresses the required terms to include in a funding agreement. The Department received questions from attendees at the Tribal consultations about the applicability of the TTP implementing regulations, 25 CFR part 170. The Department responded that these provisions would apply if the funding agreement included TTP funds. However, the Department recognizes that there are some provisions of 25 CFR part 170 that will be inapplicable or overlap with provisions in part 29 that are best addressed in the negotiation of the funding agreement between the Department and the Tribe. Therefore, the Department adds a new paragraph (j) in the final rule, which states that if the funding agreement includes TTP funds, the funding agreement will include 25 CFR part 170 provisions related to planning, inventory, and allowable use of funds necessary for administration of the TTP.

The Department retains paragraph (i) in the final rule, which requires inclusion of Federal health and safety requirements that apply to the funds. Notwithstanding the effect of 23 U.S.C. 207(n)(4), the compacts and funding agreements must include the requirements related to public health and safety that apply to the funds included in the funding agreement. Since its establishment in 1966, the Department's primary mission has always been safety. Including public health and safety requirements that relate to transportation funding ensures that this important mission continues for Tribes and other members of the traveling public.

Finally, in response to questions in the Tribal consultations, the Department adds some examples to paragraph (k) of the types of provisions that the Department and a Tribe might agree to include in a compact and funding agreement.

The Department received comments on § 29.308 from two Tribes, a Tribal organization, and a law firm requesting that the Department add a reference to title V of ISDEAA stating that the statute provides for the inclusion of title I and title V provisions as long as they do not conflict with Section 207. The Department does not agree with this characterization. Section 207(*I*) makes certain enumerated provisions of title I and title V of ISDEAA applicable to a compact and funding agreement under the Program, except to the extent the Secretary determines they conflict with section 207. The regulations in part 29 address the provisions of title V that 23 U.S.C. 207(*I*) incorporates and identifies those provisions that conflict with 23 U.S.C. 207. The rule addresses these incorporated title V provisions throughout part 29. The Department revises the title of § 29.308 to reference title I of ISDEAA.

Finally, as discussed in section II.E, the final rule moves § 29.310 regarding redesign and consolidation to subpart E, and renumbers the two remaining sections in subpart D.

#### **E. Subpart E—Rules and Procedures for Transfer and Use of Funds**

This subpart sets forth the rules regarding transfer and use of funds under the Program. This subpart also describes responsibilities of the Department with respect to the transfer of such funds, including the time to transfer the funds, and other issues related to the funding provided to Tribes through their compact and funding agreements, including the use of such funds via the funding agreement. This subpart also addresses

how Tribes may use these funds for matching or cost participation purposes and investment standards.

Section 29.400 sets forth the six categories of Department funds that a Tribe may elect to include in its funding agreement and, with agreement of a State, the transfer of funds.<sup>5</sup> The Department splits proposed paragraph (e), regarding State funds, into two paragraphs in the final rule to separate out the two formula programs that allow for such transfers. The Department revises paragraph (e) regarding highway funds to add a reference to the additional transfer authority set forth in 23 U.S.C. 207(d)(2)(A)(ii). The Department revises the language regarding transit funds in paragraph (f) for further clarity.

The Department revises in the final rule § 29.401 regarding transfer of funds to address all of the potential funds that could be transferred in a funding agreement under § 29.400. Specifically, paragraph (c)(1) addresses discretionary or competitive grants, and paragraph (c)(2) addresses State funds transferred under 23 U.S.C. 202(a)(9), 23 U.S.C. 207(d)(2)(A)(ii), or 49 U.S.C. 5311. As stated in the NPRM, while § 29.401(c)(4) sets forth the requirement from 23 U.S.C. 207(h)(2) that the Department include in a funding agreement amounts equal to the project-related administrative expenses (PRAE) incurred by the BIA that the Department would have withheld under the TTP, the Department notes that it does not presently provide to the BIA any funds for PRAE.

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<sup>5</sup> The Department will maintain a list of the funding programs eligible for inclusion in a funding agreement under § 29.400 on the self-governance website, currently at <https://www.transportation.gov/self-governance>.

The Department received 17 comments from Tribes, Tribal members, and law firms regarding the timing for transfer of funds set forth in §§ 29.403, 29.404, and 29.405. Commenters disagreed with the 30-day time frame for the Department to transfer funds to the Tribes. Commenters argued that under ISDEAA, the Department must make fund transfers within 10 days, and that the proposed regulation should not be inconsistent with ISDEAA. The comments noted that delays would negatively impact operations and planned construction or maintenance projects. Many of the comments noted the Department's concern about the ability to meet the 10-day deadline and encouraged the Department to upgrade its financial systems to allow for 10-day disbursements. One commenter suggested that FTA should implement the same payment system as FHWA and make annual lump sum advance payments.

The Department agrees that changing §§ 29.403, 29.404, and 29.405 from 30 days to 10 days is appropriate and consistent with 25 U.S.C. 5388(g), as incorporated by 23 U.S.C. 207(l)(3). While this provision only applies to initial annual transfers of funds, the Department is applying these timeframes as a matter of policy for subsequent transfers in § 29.404 and discretionary and competitive grants in § 29.405, unless the funding agreement provides otherwise. The final rule also strikes references in §§ 29.403 and 29.404 to distribution methodologies and other decisions because these decisions occur prior to the apportionment of the funds by OMB. OMB Circular No. A-11 (2016) clarifies that, consistent with 31 U.S.C. 1513(b) and E.O. 11541, an apportionment is an OMB-approved plan to use budgetary resources, which limits the obligations the Department may incur for specified time periods, programs, activities, projects, objects, or any combination. As such, the apportionment process is not complete until the

Department receives approval from OMB of its planned use of funds. The final rule also revises these provisions to include a new sentence referencing the Prompt Payment Act to clarify that there is no interest penalty so long as the Department makes the transfer within 30 days. Finally, for consistency throughout these three provisions, the Department adds the phrase “unless the funding agreement provides otherwise” in § 29.403 to §§ 29.404 and 29.405.

The Department revises for clarity in the final rule § 29.407 addressing discretionary or competitive grant awards and eligibility for contract support costs. Specifically, the first sentence states that such awards do not entitle a Tribe to contract support costs or other amounts under 25 U.S.C. 5325. Additionally, the Department strikes as unnecessary the reference to reduction in funds, which erroneously cross-referenced to § 29.413(a)(4) in the NPRM (the correct reference was § 29.414(d)(4)).

The Department revises in the final rule § 29.409 regarding carry over funds to split into separate paragraphs the periods of availability for discretionary or competitive grants and formula funds. The final rule also adds an introductory paragraph to reflect the question in the regulatory text.

For clarity in § 29.411 regarding matching or cost participation requirements, the Department adds a reference to the relevant incorporated provision of ISDEAA because there are two incorporated provisions in 23 U.S.C. 207 addressing matching and cost participation.

The Department makes minor edits to § 29.414 regarding limitations related to the transfer of funds. The final rule revises paragraph (d)(1) to align the language with the statute. In the proposed rule, paragraphs (d)(5) and (d)(7) both addressed termination.

The final rule eliminates proposed § 29.414(d)(5) and renumbers the subsequent paragraphs accordingly. The final rule corrects the citation to the Prompt Payment Act in § 29.415.

The Department makes revisions for clarity to § 29.418 regarding transfers of State funds. The final rule adds a reference to the transfer authority set forth in 23 U.S.C. 207(d)(2)(A)(ii). In paragraph (c), the final rule clarifies that the language in 23 U.S.C. 207(d)(2)(A)(ii)(III)(aa) and (bb) “during the applicable statute of limitations period related to the construction of the project” refers to compliance with applicable post-construction requirements. The Department revises paragraph (d) to align the language and format with the discussion of contract support costs in § 29.419.

With respect to § 29.419 addressing contract support costs (CSCs), the Department received comments on this matter from Tribes, Tribal organizations, and law firms, as well as several comments and questions at the Tribal consultations. Tribal commenters supported the Tribal representatives’ objection to this language, and disagreed with the Department’s preliminary interpretation that the incorporated provision of ISDEAA, 25 U.S.C. 5325(a), conflicts with 23 U.S.C. 207(h)(1). A Tribal consortium further urged the Department to find that 25 U.S.C. 5325(a), as well as other title I and title V provisions of ISDEAA, should not be found in conflict unless such a provision would undermine the effectiveness of the TTSGP. The consortium noted that, under 23 U.S.C. 207(j)(1), except as otherwise provided by law, the Secretary must interpret Federal laws, orders, and regulations in a manner to facilitate the inclusion of PSFAs and funds associated therewith, in compacts and funding agreements. Other Tribes referenced the ISDEAA definition of CSCs, and stated that CSC activities do not



duplicate activities of the Department, and CSCs are an integral component of the ISDEAA program. Tribal commenters stated that CSCs are eligible expenses and are critical financial resources required by Tribes to operate and manage Federal programs. The Department acknowledges that Tribal commenters and Tribal representatives on the Committee disagreed with the Department's position and the Tribes' articulation of the critical need to fund Tribal transportation infrastructure. The Committee agreed that, under 25 U.S.C. 5325, CSCs are not applicable to amounts transferred to a Tribe pursuant to a discretionary or competitive grant award, or Federal-aid funds transferred under 23 U.S.C. 202(a)(9).

Following additional review of this issue and after considering the rationale in the Tribal comments regarding the applicability of CSCs to formula funding, it is the Department's determination that 25 U.S.C. 5325(a), as incorporated by 23 U.S.C. 207(l)(8), conflicts with 23 U.S.C. 207(h) consistent with the Department's analysis in the NPRM. *See* 84 FR 52706, 52710–52712 (Oct. 2, 2019).

The Department acknowledges that, except to the extent there are conflicts, 25 U.S.C. 5325(a) is made applicable to the Program pursuant to 23 U.S.C. 207(l)(8). However, pursuant to 23 U.S.C. 207(l), the Department has determined that 25 U.S.C. 5325(a) conflicts with 23 U.S.C. 207(h), which mandates that the Secretary provide funds to Tribes in “an amount equal to” (1) the sum of funds the Tribes would receive under a funding formula or other allocation method established under title 23 and chapter 53 of title 49 of the U.S. Code added to “(2) such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the Bureau

of Indian Affairs for administration of the program or project.”<sup>6</sup> The plain language of 23 U.S.C. 207(h) is a funding limitation because the provision uses the phrase “an amount equal to.” This limitation conflicts with two mandates in 25 U.S.C. 5325(a) that otherwise direct the Department: (1) to provide to a Tribe funds, pursuant to 25 U.S.C. 5325(a)(1), in an amount “not . . . less than” the agency would have provided to operate the program for the contract period, including supportive administrative functions;” and (2) to “add,” pursuant to 25 U.S.C. 5325(a)(2), contract support costs (CSCs) to the amount provided under 25 U.S.C. 5325(a)(1). Because the mandates in 25 U.S.C. 5325(a)(1)–(2), directing the Department to supplement the funding it provides to Tribes, are in direct conflict with the limitation on funding set forth in 23 U.S.C. 207(h), the Department is not persuaded by the comments and maintains that the statutory conflict it identified in the NPRM renders 25 U.S.C. 5325(a) inapplicable to the Program.

There is additional support for the Department’s conclusion. The funds set forth in 25 U.S.C. 5325(a)(1), which the “Secretary would have otherwise provided for the operation of the programs or portions thereof,” do not describe any sources of funds eligible to be transferred under 23 U.S.C. 207(d)(2)(A) because Congress directed the Department to make available in funding agreements only direct financial assistance to Tribes. *See also* § 29.400. The Department has never operated a program or portions thereof for the benefit of Tribes.<sup>7</sup> Therefore, Tribes carrying out their Tribal PSFAs with Department funding do not risk diminishing their program resources due to their

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<sup>6</sup> The Department does not withhold funds for the costs of the Bureau of Indian Affairs for project or program administration, and therefore anticipates that this amount will always be zero.

<sup>7</sup> Notably, 23 U.S.C. 207(d)(2)(A)(i) authorizes the Department to transfer in a funding agreement funding associated with formula, discretionary, or competitive grant programs for which Tribes are eligible recipients. It does not, however, transfer programs in which the Department carries out inherent Federal functions, such as when Federal employees operate the air traffic control program.

participation in the Program because the Department has never administered the activities.

The Department administers two programs—the TTP and the Tribal Transit Program—that solely benefit Tribes and that allocate funds to Tribes under a funding formula. Tribes receive formula funds (and may compete to receive other discretionary funds) that a Tribe may direct toward constructing, maintaining, refurbishing, or rehabilitating infrastructure, transportation facilities, as well as related operational costs. As such, Tribes—like States and municipalities—must make difficult decisions about how to direct Federal funding. Tribes may use TTSGP funds to recover direct, indirect, startup, and pre-award costs associated with the implementation and operation of their transportation programs, subject to applicable requirements contained in statutes governing the sources of funds, applicable cost principles under 2 CFR part 200, and any applicable caps on indirect cost funding. Under these programs, Tribal recipients may use Federal funds for eligible planning, operating, and capital expenses. In addition, Tribes may use program funds for startup and audit costs, including the reimbursement of eligible pre-award costs when authorized by agency policy or the TTSGP. This does not mean that additional funds have been authorized or appropriated for these expenses, since there are no additional funds to provide to Tribes for CSCs. Based on the Department's determination, the funding limitation in 23 U.S.C. 207(h) does not allow any other outcome.

Additionally, some commenters acknowledged that there are no Department appropriations for CSCs, but proposed the Department add a new section for the transfer of CSCs to Tribes if Congress provides future appropriations for CSCs. Such a provision

would be inconsistent with the Department's determination that inclusion of CSCs conflicts with 23 U.S.C. 207.

The Department also received numerous comments supporting the Tribal views regarding § 29.420 and noting that, in the absence of additional funds being made available for facility lease payments, Tribes will have to divert funds from needed infrastructure improvements to cover facility support costs. Here too, the comments did not present new rationale to overcome the Department's determination. As such, the Department declines to change its approach regarding the applicability of facility lease and support costs under 25 U.S.C. 5324(*l*). The Department acknowledges that Tribal commenters and Tribal representatives on the Committee disagreed with the Department's position.

Similar to the Department's analysis regarding CSCs, the Department has determined that the funding limitation of 23 U.S.C. 207(h) conflicts with the mandate in section 105(*l*) of ISDEAA, codified at 25 U.S.C. 5324(*l*), and incorporated by 23 U.S.C. 207(*l*)(8), to provide additional amounts for facility lease and support costs. A conflict exists because the amount of 25 U.S.C. 5324(*l*) funds and 23 U.S.C. 207(d)(2)(A) funds would never "equal" the amount contemplated by 23 U.S.C. 207(h). Accordingly, the Department invokes its authority under 23 U.S.C. 207(*l*) to determine a conflict makes 25 U.S.C. 5324(*l*) inapplicable to the Program. Finally, the Department understands that the two Tribal Transportation programs require Tribes to make difficult choices in determining how best to allocate limited Federal funding within their Tribal transportation and transit programs.

In the proposed rule, the Department addressed redesign, consolidation, reallocation, or redirection of funds in § 29.310 in subpart D, which addresses terms of compacts and funding agreements. Upon further consideration, because § 29.310 addresses the use of funds, the final rule moves this provision to § 29.421 in subpart E because that subpart generally addresses how the Department transfers and the Tribes use funds.

The Department received five comments from Tribes, Tribal members, and Tribal organizations regarding proposed § 29.310. Commenters noted that seeking the Department's approval to redesign or reprogram funds is incongruent with the tenets of self-governance and Tribal sovereignty. Some commenters noted that proposed § 29.310 provided for redesign, reprogramming, and reallocation consistent with Section 207, but disagreed with the provision requiring that Tribes reprogram or reallocate funds consistent with the transportation improvement program (TIP). Some commenters stated that submitting a TIP to the Department for approval undermines Tribal self-governance.

Section 207(e)(1)(A)(ii)(I) requires that Tribes expend the funds on projects identified in an approved TIP, and the Department cannot waive this statutory requirement. *See also* 23 U.S.C. 202(b)(4)(B). The Department did revise the final rule provision, § 29.421, to improve clarity. Specifically, the final rule subdivides the language into multiple paragraphs. Additionally, the final rule revises paragraph (b) to better respond to the question and clarify that a Tribe may not redesign, consolidate, reallocate, or redirect discretionary or competitive grant funds, consistent with Section 207.

#### **F. Subpart F—Program Operations**

This subpart includes information and instructions to Tribes that participate in the TTSGP. Topics covered in this subpart include: (1) audits and cost principles; (2) financial, procurement, and property management systems and standards; (3) procurement requirements; (4) property; (5) recordkeeping requirements; (6) reporting; (7) technical assistance; (8) prevailing wages; (9) Tribal preference; (10) environmental and cultural resource compliance; (11) Federal Tort Claims Act applicability; and (12) waiver of TTSGP regulations. The Department received four general comments on Subpart F, supporting the inclusion of provisions that impose requirements familiar to Tribes participating in self-governance programs with DOI and IHS.

The proposed rule included near identical provisions addressing record retention in proposed §§ 29.502 and 29.514. In the final rule, the Department eliminates the proposed § 29.502 in favor of a consolidated provision in § 29.513. Given the removal of this section, the final rule numbering for the subsequent sections in subpart F differs by one from the numbering in the proposed rule.

In the final rule, the Department makes several edits to §§ 29.505, 29.506 and 29.507 (proposed §§ 29.506, 29.507, and 29.508) to make these sections easier to understand and reduce overlapping language. Additionally, § 29.507 addresses the minimum requirements for a Tribe's financial management system. This provision is similar to an existing provision in 25 CFR 900.45, implementing title I of ISDEAA, except for paragraphs addressing source documentation and cash management. The final rule includes two new paragraphs addressing source documentation and cash management based on the language in 25 CFR 900.45.

The Department revises the introductory phrase of paragraph (a)(4)(ii) of § 29.515 regarding procurement standards to align with the statute. With respect to § 29.517 (proposed § 29.518) addressing a Tribe's use of Federal supply sources in the performance of a compact and funding agreement, a commenter noted difficulties with obtaining approvals for access to the General Services Administration's systems and surplus property. Consistent with § 29.517, the Department will make reasonable efforts to expedite approvals as requested.

Section 29.523 (proposed § 29.524) addresses technical assistance, clarifying that the Department is committed to carrying out the principles of self-governance while also ensuring proper stewardship and oversight of Federal funds. The Department received questions about the specific types of technical assistance that would be available. While the Department did not make any changes in the final rule, it views technical assistance as part of its commitment to self-governance as well as its program management and oversight responsibilities. The Department anticipates responding to technical assistance requests on a case-by-case basis and recognizes the importance to Tribes of building their internal transportation capacity.

The Department received one comment on § 29.527 (proposed § 29.528) from a Tribal member who asked whether compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) was required to establish a right-of-way on a BIA-owned trust property, and whether there was any conflict with 25 CFR part 169 and subpart F of this rule. These regulations would not affect the DOI's authority over rights-of-way on Tribal lands. DOI will continue to exercise its authority relating to the

application, review, grant, administration, and oversight of rights-of-way on Tribal lands under 25 U.S.C. 323–328 and 25 CFR part 169.

The Department received four comments from a Tribe, Tribal member, and a law firm on proposed § 29.535 regarding the process and criteria for granting waivers from part 29. Two commenters noted that proposed § 29.535 implements 23 U.S.C. 207(j)(2), which directs a Tribe to submit a written request to the Secretary to waive application of a part 29 provision to a compact or funding agreement by “identify[ing] the regulation sought to be waived and the basis for the request.” Specifically, commenters stated that the criteria in proposed § 29.535 are overly broad, ambiguous, and may make granting waivers more difficult or cause inconsistent application. Commenters recommended that the Department review the criteria for granting a waiver in 49 CFR part 5 and simplify the proposed regulation accordingly. Commenters also asked whether failure by the Department to respond to a waiver request within 90 days would result in an automatic approval of the waiver.

The Department notes that it substantially revised its rulemaking procedures, including those in 49 CFR part 5, in December 2019 and eliminated the criteria referenced by the commenters. *See* 84 FR 71714 (Dec. 27, 2019). After further consideration of the comments and discussion by the drafting subcommittee, the Department is retaining the waiver criteria, set forth in § 29.524 in the final rule, but updates paragraph (d)(2) to add “consistent with the principles of self-governance.” The Department notes that paragraph (e) states that waiver requests are deemed approved by operation of law if the Department does not take action on a request within 90 days of receipt of the request.



#### **G. Subpart G—Withdrawal**

Subpart G sets forth the process for a Tribe to withdraw from a consortium's compact or funding agreement with the Department, including distribution of the Tribe's shares of TTSGP funding. It clarifies that the Department is not a party to internal consortia disputes and would provide notice to consortia that seek to participate in the TTSGP that their agreements should adequately address the circumstances under which a member Tribe may withdraw.

The Department did not receive any comments on the provisions in this subpart and only makes minor edits for clarity to these sections in the final rule.

#### **H. Subpart H—Retrocession**

This subpart provides that a Tribe may voluntarily discontinue performing a portion or all of the PSFAs under its compact and funding agreement, and may return remaining funds to the Department in accordance with the process set forth in this subpart. It also clarifies the effect of a Tribe's retrocession on its eligibility, and sets forth how funds must be distributed when the retrocession takes effect.

The Department did not receive any comments on the provisions in this subpart and only makes minor edits for clarity to these sections in the final rule.

#### **I. Subpart I—Termination and Reassumption**

This subpart sets forth when and under what circumstances the Department may terminate a Tribe's compact or funding agreement. The Department received one comment regarding determinations of imminent jeopardy with respect to trust assets that could trigger a termination under this subpart. The commenter noted that such

determinations are made by the Office of Special Trustee under the regulations applicable to the DOI self-governance program.

The Department notes that 23 U.S.C. 207(f)(2)(B)(i) applies the imminent jeopardy standard to “a trust asset, natural resources, or public health and safety.” Although the Department does not hold trust assets or natural resources on behalf of Tribes, the final rule retains this phrase in § 29.800 because it is consistent with Section 207. The Department does not reference the Office of Special Trustee because termination decisions under this standard are made solely at the discretion of the Department, consistent with 23 U.S.C. 207(f)(2)(B)(i).

#### **J. Subpart J—Dispute Resolution and Appeals**

This subpart sets forth procedures, including alternative dispute resolution mechanisms, that a Tribe may use to resolve disputes with the Department arising before or after execution of a compact or funding agreement, as well as the appeal rights and procedures Tribes must use to appeal Departmental decisions to terminate a Tribe’s compact or funding agreement. It establishes the process for filing and processing appeals from adverse decisions and the applicable burden of proof. This subpart also contains the Department’s preferred language on § 29.906, reflecting an area of disagreement regarding exhaustion of administrative remedies. The Tribal and Departmental views regarding this disagreement item are set forth in the NPRM. *See* 84 FR 52706, 52712 (Oct. 2, 2019).

The Department received comments from two Tribes, an intertribal organization, and a law firm generally supporting the Department’s streamlined approach in subpart J. In particular, commenters supported the narrow class of determinations that may be

appealed in § 29.903, clear timelines in §§ 29.907 and 29.919, and clarity with respect to the effect of appeals in §§ 29.923 and 29.931. However, 15 comments from Tribes, Tribal organizations, and law firms adopted the Tribal Committee members' position opposing the proposed provision on the exhaustion of administrative remedies, § 29.906. Commenters noted that Section 207 does not require exhaustion of administrative remedies. They further stated that pursuing administrative remedies is an act of self-determination and self-governance to which the Department should give deference. They reasoned that exhaustion, when not mandated by a statute, is an infringement on Tribal sovereignty; that the exhaustion requirement is inconsistent with DOI and IHS regulations; and that Tribes have limited resources with which to pursue administrative or judicial remedies. Therefore, the commenters encouraged the Department to interpret the provision in favor of Tribes not to require administrative exhaustion.

The Department has considered the comments it received and is retaining the provision in § 29.906 to require exhaustion of administrative remedies for pre-award disputes. Section 207 does not incorporate by reference 25 U.S.C. 5331 of ISDEAA. The Department interprets 25 U.S.C. 5331 to address the proper venue and relief that can be granted for civil actions filed pursuant to this section, but it does not address timing of when these civil actions may be brought. Tribes disagree with this interpretation.

While Section 207 does not include an express exhaustion requirement, the Department interprets the Administrative Procedure Act and Supreme Court precedent to grant the Department discretion to impose a requirement that Tribes exhaust their administrative remedies before proceeding to the U.S. District Courts. The final rule establishes a two-step process for pre-award disputes, under which initial decisions are

made by the Self-Governance Official and appealed to a hearing official appointed by the Office of the General Counsel. This efficient process will ensure a proper record for certain pre-award disputes that will benefit both the Department and the Tribe. The Department notes that the exhaustion requirement does not apply to appeals of the Department's denial of a final offer because Section 207 provides that a Tribe may proceed directly to the U.S. District Courts, in lieu of an administrative appeal.

Finally, in the final rule, the Department revises § 29.930 and adds §§ 29.931 and 29.932 to address administrative law judge (ALJ) decisions in termination appeals. Because such decisions are not final agency actions, the final rule provides a process for review by the Secretary, or her designee, if the Department or the Tribe elects to appeal the ALJ's decision. Otherwise, the ALJ's decision becomes the final decision of the Secretary after 30 days.

## **K. Other Comments**

### **1. Office of Self-Governance**

The Committee did not reach consensus on the issue of whether to create an Office of Self-Governance. The proposed rule set forth the Tribal and Departmental positions. *See* 84 FR 52706, 52710 (Oct. 2, 2019). The Department received 37 comments from Tribes, Tribal members, and law firms regarding the establishment of an Office of Self-Governance. Commenters supported the creation of an office before the rule becomes effective. Commenters stated that without an Office of Self-Governance, implementation of the program could be haphazard and inefficient. Commenters maintained that without an Office of Self-Governance, Department personnel might be overwhelmed by the number of applications, and staff might lack the proper experience

necessary to handle Tribal issues resulting in negative impacts to the Tribes. In support of establishing an Office of Self-Governance, commenters pointed to established offices at DOI and IHS that have helped those agencies successfully work with Tribes and implement new programs. Additionally, commenters maintained that establishing an Office of Self-Governance would provide a point of contact to Tribes regarding the Program, coordinate the Department's policies relating to the Program, and establish long-term institutional expertise within the Department.

The Department carefully considered the Tribal comments, views, and recommendations on this issue, but is not in a position to accept the Tribal proposal to establish an Office of Self-Governance through this rule. As discussed in the NPRM, Section 207 does not require the Department to establish an Office of Self-Governance, and it is not Federal agency practice to establish new offices in regulation. The Department is not persuaded that it must establish in this regulation a new office to ensure that the Department effectively implements the Program. The Department has experience implementing programs by diverting resources and staff to meet program needs and will administer its internal operations, as necessary, to implement the TTSGP. The regulations provide for a Self-Governance Official, who is charged with the responsibility to ensure proper implementation of the Program. In addition, the Deputy Assistant Secretary for Tribal Affairs has authority to coordinate across the Department to provide Tribal representatives with information and technical assistance.

## **2. Self-Governance Advisory Committee**

The Committee did not reach consensus on the issue of whether to create a self-governance advisory committee, similar to those that exist within DOI and IHS. Tribal

members requested the Department establish an advisory committee in the regulations or otherwise, and the NPRM set forth the Tribal position, 84 FR 52706, 52710 (Oct. 2, 2019). Commenters stated that input from Tribal leaders is important for the development and implementation of programs, pointing to recently proposed rules that were developed with Tribal input. Commenters maintained that creating an advisory committee would save the Department funds because members of the committee would provide better oversight and administration of Tribal programs, promote best practices among participating Tribes, and facilitate the Department's consultation with Tribes. Commenters noted that established self-governance advisory committees have been successful in other agencies, such as DOI, and noted the success of a recently established advisory committee within the Department. Commenters discussed the lack of channels available for Tribes to share information about their transportation needs with Department officials, stating that this has contributed to unsafe Tribal transportation systems. Commenters recommended that the Department establish an advisory committee during the implementation and transition periods for Tribes entering the Program to make recommendations on necessary improvements to the Program and provide guidance to the Department. One commenter recommended the advisory committee be established by regulation so that it is permanent and a change in administrations would not affect its duration.

The Department has carefully considered the Tribal comments, views, and recommendations on this issue, but it has decided not to establish an advisory committee in this rule. The Department is committed to working with Tribal representatives to address the concerns identified by Tribal representatives in implementing the Program in

a manner that is transparent, collaborative, and that furthers and fosters Tribal self-governance. The Department also recognizes that other Federal agencies have engaged with Tribal governments by establishing advisory committees to address implementation, transition, and improvement recommendations. The Department will continue to engage with Tribal representatives to ensure the Department solicits Tribal views and considers them in implementing the program. The Department also encourages Tribal representatives to contact the Office of Government Affairs with any concerns or suggestions regarding the program.

### **3. Additional Comments**

The Department received questions from Tribal members about the statutory deadline for the final rule. Section 207 provides that the authority to promulgate regulations for the Program expires 48 months after the date of enactment of the FAST Act, or December 4, 2019, which may be extended up to 180 days if the Committee determines it needs more time and the Department notifies Congress. 23 U.S.C. 207(n)(1). The Committee invoked this extension for the final rule until June 1, 2020, and the Department notified Congress on November 26, 2019.

The Department received a comment from a Tribal member encouraging the Department to include a provision requiring a negotiated rulemaking process for any future rulemakings to amend part 29. The Department does not find it necessary or appropriate to include such a provision in the regulation itself. The Department would make a process determination if and when it engages in a rulemaking to amend part 29 and would consult with Tribes on the process, consistent with § 29.6.

The Department received one comment, addressing use of Department facilities, equipment, and property, from a transit agency noting that while recipients of FTA funding must report to the National Transit Database (NTD), much of the current NTD system is not applicable to Tribal governments. The commenter encouraged FTA to develop a module specific to Tribal governments. The Department acknowledges the comment.

#### **IV. Regulatory Analyses and Notices**

##### **A. Executive Order 12866, *Regulatory Planning and Review*, Executive Order 13563, *Improving Regulation and Regulatory Review*, Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, and DOT Regulatory Policies and Procedures**

The Department, in consultation with the Office of Management and Budget, has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order (E.O.) 12866 or within the meaning of DOT regulatory policies and procedures. Because this rule is not significant under E.O. 12866, the rule is not an E.O. 13771 regulatory action.

E.O. 12866 and E.O. 13563 require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” DOT believes that the economic impact of this rule will be minimal. The rule establishes the TTSGP, which offers Tribes a new mechanism to receive funds from the Department. The Department will incur a minimal amount of administrative costs to create and administer the TTSGP, but plans to accomplish this work predominantly by



reallocating existing full-time employees rather than through a net increase in staff levels. Thus, the rule will not fundamentally affect funding or resource levels within the Department.

The Department believes that Tribes could experience modest cost savings relative to the status quo if they join the TTSGP. These savings might arise due to increased efficiencies from streamlined contract negotiations, simplified fund transfers, and greater autonomy to manage funds. Tribes may incur minimal administrative costs to join the TTSGP, such as drafting letters of interest and participating in negotiation meetings. Joining is voluntary, however, and Tribes are unlikely to join unless they experience cost savings greater than any increase in administrative costs.

The Department also expects that Tribes will experience benefits from joining the TTSGP. These benefits include greater legal certainty and protections, greater clarity from using consolidated funding agreements, more timely delivery of funds, and greater autonomy. These benefits will lead to positive outcomes for project planning, management, and delivery.

#### **B. Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354; 5 U.S.C. 601–612), DOT has evaluated the effects of this rule on small entities, such as local governments and businesses. Based on the evaluation, the Department concluded that this action will not have a significant economic impact on small entities. The Department determined that this rule only has an impact on the Federal Government and Tribes, which are not small entities for purposes of this Act. The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities.

**C. Unfunded Mandates Reform Act**

The Department has determined that this rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$151 million or more in any one year (when adjusted for inflation) in 2012 dollars. In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have the authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The funding programs subject to this rulemaking permit this type of flexibility.

**D. Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights***

The Department analyzed this rule under E.O. 12630. The Department determined that this rule will not affect taking of private property interests or otherwise have taking implications under E.O. 12630.

**E. Executive Order 13132, *Federalism***

The Department analyzed this rule in accordance with the principles and criteria contained in E.O. 13132. This rule will impact Tribal governments, but there is no federalism impact on the relationship or balance of power between the United States and Tribes affected by this rule. The Department determined that this rule will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Department has also determined that this rule will not preempt any State law or

regulation, or affect the States' ability to discharge traditional State governmental functions.

**F. Executive Order 12988, *Civil Justice Reform***

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

**G. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The Department has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

**H. National Environmental Policy Act**

The Department has analyzed the environmental impacts of this final rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, *Procedures for Considering Environmental Impacts* (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* The purpose of this rulemaking is to establish a self-governance program at the Department, which will not

have any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

**I. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments***

The Department analyzed this rule under E.O. 13175 and determined that the rule uniquely affects Tribal governments. Therefore, it followed departmental and Administration procedures to consult with Tribal governments on the proposed rule as described in section I.B.2. The Department evaluated this action for potential effects on Tribes and determined that the rule will not impose substantial direct compliance costs on Tribes, will not preempt Tribal law, will not have any potentially adverse effects, economic or otherwise, on the viability of Tribes. Rather, this action will reduce the administrative burden on Tribes participating in the Program. Therefore, a Tribal summary impact statement is not required.

The Department conducted a negotiated rulemaking with Tribal and Federal representatives, including Tribal consultations concerning the proposed rule, which the Department asserts fulfills its obligations to consult, as appropriate. The results of the negotiated rulemaking meetings were periodically reported and discussed in other Federal and Tribal fora. The Tribal and Federal representatives reached consensus on the final rule, including the characterization of all disagreement items.

**J. Executive Order 13045, *Protection of Children from Environmental Health Risks and Safety Risks***

The Department analyzed this rule under E.O. 13045. The Department certifies that this rule will not cause an environmental risk to health or safety that may disproportionately affect children.

**K. Regulation Identifier Number**

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects in 49 CFR Part 29**

Grant programs – transportation, Grant programs – Indians, Indians.

Elaine L. Chao,  
Secretary of Transportation.

For the reasons set out in the preamble, the Department of Transportation adds part 29 to title 49 of the Code of Federal Regulations to read as follows:

**PART 29—TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM**

**Subpart A—General Provisions**

Sec.

29.1 What is the purpose and authority for this part?

29.2 What is the Department's policy for the Program?

29.3 What is the effect of this part on existing Tribal rights?

- 29.4 How do Departmental circulars, policies, manuals, guidance, or rules apply to a Tribe's performance under the Program?
- 29.5 Who is responsible for carrying out the functions connected with the Program?
- 29.6 Must the Department consult with Tribes regarding matters that affect the Program?
- 29.7 What is the effect of this Program on existing Tribal Transportation Program agreements?
- 29.8 What happens if more than one party purports to be the authorized representative of a Tribe?
- 29.9 What definitions apply to this part?

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29.529 What steps should a Tribe take after becoming aware of a Federal Tort Claim?

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29.531 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the compact and funding agreement?

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29.534 What is the process for regulation waivers under this part?

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29.600 May a Tribe withdraw from a consortium?

29.601 When does a withdrawal from a consortium become effective?

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### **Subpart H—Retrocession**

29.700 May a Tribe retrocede a PSFA and the associated funds?

29.701 How does a Tribe notify the Department of its intention to retrocede?

29.702 What happens if the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede?

29.703 What happens if the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede?

29.704 When is the retrocession effective?

29.705 What effect will a retrocession have on a Tribe's right to compact under the Program?

29.706 Will retrocession adversely affect future funding available for the retroceded program?

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29.800 When can the Department reassume a compact or funding agreement?

29.801 Can the Department reassume a portion of a compact or funding agreement and the associated funds?

29.802 What process must the Department follow before termination of a compact or funding agreement (or portion thereof)?

29.803 What happens if the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice?

29.804 When may the Department reassume?

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29.806 Upon termination, what happens to the funds associated with the terminated portions of the compact or funding agreement?

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29.900 What is the purpose of this subpart?

29.901 Can the Department and a Tribe resolve disputes using alternative dispute resolution processes?

29.902 Does the Equal Access to Justice Act apply to the Program?

29.903 What determinations may not be appealed under this subpart?

#### *Pre-Award Decisions*

- 29.904 What are pre-award decisions that a Tribe may appeal?
- 29.905 To whom does a Tribe appeal a pre-award decision?
- 29.906 Must a Tribe exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts for a pre-award decision?
- 29.907 When and how must a Tribe appeal a pre-award decision?
- 29.908 May a Tribe request an extension of time to file an administrative appeal?
- 29.909 When and how must the hearing official respond to the Tribe's appeal?
- 29.910 What is the Department's burden of proof for appeals of pre-award decisions?
- 29.911 What is the effect of a pending appeal on negotiations?

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- 29.912 What is a post-award dispute?
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- 29.918 What information must the Self-Governance Official's decision contain?
- 29.919 When must the Self-Governance Official issue a written decision on the claim?
- 29.920 Is a decision of the Self-Governance Official final?
- 29.921 Where may a Tribe appeal the Self-Governance Official's decision on a Contract Disputes Act claim?
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- 29.924 May a Tribe appeal the Department's decision to terminate a compact or funding agreement?
- 29.925 Is a Tribe entitled to a hearing on the record?
- 29.926 What rights do the Department and the Tribe have in an appeal of a termination decision?
- 29.927 What notice and service must the Department and the Tribe provide?
- 29.928 What is the Department's burden of proof for a termination decision?
- 29.929 How will the Department communicate its decision following a hearing on a termination decision?
- 29.930 May the Department or the Tribe appeal the decision of an administrative law judge?
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- 29.932 May a Tribe appeal the decision of the Secretary?
- 29.933 What is the effect of an appeal on negotiations?

Authority: 23 U.S.C. 207

## **Subpart A—General Provisions**

### **§ 29.1 What is the purpose and authority for this part?**

(a) The regulations in this part implement the Tribal Transportation Self Governance Program established in 23 U.S.C. 207 and set forth rules for compacts and funding agreements negotiated between the Department and Tribes eligible under the Program.

(b) The Department prepared and issued these rules pursuant to 23 U.S.C. 207(n) with the active participation and representation of Tribes, Tribal organizations, consortia, and individual Tribal members, consistent with the procedures of the Negotiated Rulemaking Act.

### **§ 29.2 What is the Department's policy for the Program?**

It is the Department's policy to:

(a) Recognize the unique government-to-government relationship with Tribes, including the right of Tribes to self-government, and to support Tribal sovereignty and self-determination;

(b) Encourage Tribes to participate in the Program;

(c) Affirm and enable the United States to fulfill its obligations to Tribes under treaties and other laws, and to ensure the continuation of the trust responsibility of the United States to Tribes and Indians that exist under treaties, other laws, and Executive orders;

(d) Interpret Federal laws and regulations in a manner that will facilitate the inclusion of eligible funds in funding agreements under the Program to carry out Tribal PSFAs, except as otherwise provided by law;

(e) Consult with Tribes directly and meaningfully on policies that have Tribal implications and affect the Program;

(f) Acknowledge that Tribes perform PSFAs as an exercise of Tribal self-determination and self-governance; are responsible for day-to-day operation of PSFAs carried out under the Program; and accept responsibility and accountability for the use of funds and satisfactory performance consistent with the terms of funding agreements; and

(g) Liberally construe this part to effectuate 23 U.S.C. 207 for the benefit of Tribes participating in the Program.

### **§ 29.3 What is the effect of this part on existing Tribal rights?**

(a) A Tribe may apply for the Program at any time, but nothing in this part requires a Tribe to do so.

(b) A Tribe's decision to participate in the Program does not:

(1) Affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by the Tribe;

(2) Terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe or individual Indians; or

(3) Reduce the amount of the Tribe's formula or discretionary funding from the Department or impair the Tribe's ability to obtain funding from another Federal program.

### **§ 29.4 How do Departmental circulars, policies, manuals, guidance, or rules apply to a Tribe's performance under the Program?**

A Tribe's performance under the Program is not subject to any Departmental circular, policy, manual, guidance, or rule, except for this part, unless the Department and the Tribe otherwise negotiate and agree in the compact or funding agreement.

**§ 29.5 Who is responsible for carrying out the functions connected with the Program?**

The Department will carry out the Program, including making eligibility determinations; negotiating compacts and funding agreements with Tribes; overseeing compliance with Department requirements; and otherwise administering and implementing the Program consistent with this part. As provided in § 29.402, a Tribe is responsible for day-to-day management of the Tribe's PSFAs consistent with the compact and funding agreement.

**§ 29.6 Must the Department consult with Tribes regarding matters that affect the Program?**

The Department must consult with Tribes on matters relating to the Program. The Department will carry out consultations in accordance with Executive Order 13175 and applicable Department policies, including the Department's Tribal Consultation Plan.

**§ 29.7 What is the effect of this Program on existing Tribal Transportation Program agreements?**

This Program does not terminate existing authority for a Tribe to enter into agreements with the Federal Highway Administration, or contracts or agreements with the Department of the Interior, for the Tribal Transportation Program. A Tribe may maintain its current contracts or agreements, or include Tribal Transportation Program funds in a funding agreement under this Program. A Tribe may only have one agreement at a time for the same funds.

**§ 29.8 What happens if more than one party purports to be the authorized representative of a Tribe?**

If more than one party purports to be the authorized representative of a Tribe during the negotiation of a compact, funding agreement, or amendment, the Department will notify the parties, consult with the Department of the Interior, defer negotiation or execution of any documents, if necessary, until such authority is clarified, and provide written notice to the parties of the Department's decision to defer.

#### **§ 29.9 What definitions apply to this part?**

Unless otherwise provided, the following definitions apply to this part:

*Appeal* means a request by a Tribe for an administrative or judicial review of a decision by the Department.

*Self-Governance Official* means a Department official responsible for overseeing the Program and carrying out the responsibilities set forth in this part.

*Compact* means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(c) and this part that sets forth the general terms that will govern the Tribe's participation in the Program and affirms the government-to-government relationship.

*Consortium* means an organization or association of Tribes that is authorized by those Tribes to participate in the Program under this part and is responsible for negotiating, executing, and implementing compacts and funding agreements on behalf of its member Tribes.

*Consultation* means the process by which the Department and Tribes engage in timely, substantive, and meaningful government-to-government communication, collaboration and participation, and exchange views in furtherance of the Federal trust responsibility and the principles of self-governance, before any action is taken that will



have Tribal implications as defined by Executive Order 13175, in accordance with the Department's Tribal Consultation Plan, Executive Order 13175, all subsequent Presidential Memoranda regarding Tribal consultation, and applicable Federal law.

*Contractor* means a third party who has entered into a legally binding agreement with a Tribe to provide goods or services.

*Days* means calendar days. When the last day of any time period specified in this part falls on a Saturday, Sunday, or Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

*Department* means the U.S. Department of Transportation.

*Discretionary or competitive grant* means funds provided by the Department where it selects the award amount and recipients from among all eligible applicants consistent with the legislative and regulatory requirements and selection criteria established for a program.

*Excess property* means real or personal property under the control of a Federal agency that is not required for the agency's needs and the discharge of its responsibilities.

*Funding agreement* means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(d) and this part that identifies the funds the Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

*Gross mismanagement* means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for a PSFA carried out by a Tribe.

*Imminent jeopardy* means an immediate threat to a trust asset, natural resource, or public health and safety that is caused by the act or omission of a Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement.

*Indian* means a person who is a member or citizen of a Tribe.

*Indian Tribe* or *Tribe* means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community (including colonies and rancherias) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In any case in which an Indian Tribe has authorized another Indian Tribe, an intertribal consortium, or a Tribal organization to plan for or carry out PSFAs on its behalf under this part, the authorized Indian Tribe, intertribal consortium, or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in title 23 of the U.S. Code). In such event, the term Indian Tribe or Tribe as used in this part shall include such other authorized Indian Tribe, intertribal consortium, or Tribal organization.

*Inherent Federal functions* means those Federal functions that cannot legally be delegated to a non-Federal entity, including a Tribe.

*Operating Administration* means a component administration of the U.S. Department of Transportation.

*Program* means the Tribal Transportation Self-Governance Program established by 23 U.S.C. 207.

*Project* means any activity determined as being eligible under the U.S. Code title and program for which funds are being provided.

*Programs, services, functions, and activities or PSFAs* means programs, services, functions, and activities, or portions thereof, that a Tribe carries out using funds included in a funding agreement under the Program.

*Real property* means any interest in land together with the improvements, structures, and fixtures and appurtenances.

*Reassumption* means the termination, in whole or part, of a funding agreement and assuming or reassuming the remaining funds included in the compact and funding agreement pursuant to 23 U.S.C. 207(f)(2)(A).

*Receipt* means the actual date on which a submission is received. With respect to receipt by the Department, receipt is the date on which the Department official specified in this part receives the submission. Demonstration of receipt includes a postal return receipt, express delivery service receipt, or any other method that demonstrates actual receipt by the Departmental official specified in this part, including via electronic mail.

*Retrocession* means the voluntary return of a Tribe's PSFA and associated remaining funds for any reason before or on the expiration of the term of the funding agreement.

*Secretary* means the Secretary of Transportation.

*Self-Determination Contract* means a contract (or grant or cooperative agreement) entered into pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) between a Tribe and the appropriate Federal agency for the planning, conducting and administration of programs or services that are otherwise provided to Tribes.

*Self-governance* means the Federal policy of Indian self-determination and self-government rooted in the inherent sovereignty of Tribes, reflected in the government-to-

government relationship between the United States and Tribes, and expressed in the Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, as amended, and the policy of Tribal self-determination established under the Program.

*State* means any of the 50 States, the District of Columbia, or Puerto Rico.

*Surplus government property* means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration.

*Technical assistance* means the process by which the Department provides targeted support to a Tribe with a development need or problem.

*Transit* means regular, continuing shared ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income, excluding the transportation services set forth in 49 U.S.C. 5302(14)(B).

*Tribal Transportation Program (TTP)* means a program established in section 1119 of Moving Ahead for Progress in the 21st Century (MAP-21), Pub. L. 112–141 (July 6, 2012), and codified in 23 U.S.C. 201 and 202. The Fixing America’s Surface Transportation Act (FAST Act), Pub. L. 114–94 (December 4, 2015) reauthorized this program.

*TTP Agreement* means an agreement between a Tribe and either the Federal Highway Administration or the Bureau of Indian Affairs pursuant to 23 U.S.C. 202 that authorizes a Tribe to carry out all but the inherently Federal functions of the TTP.

*Tribal Organization* means the recognized governing body of any Tribe, any legally established organization of Indians that is controlled, sanctioned, or chartered by such

governing body or is democratically elected by the adult members of the Indian community to be served by such organization, and includes the maximum participation of Indians in all phases of its activities.

## **Subpart B—Eligibility and Negotiation Process**

### ***Eligibility***

#### **§ 29.100 What are the criteria for eligibility to participate in the Program?**

(a) *Eligibility.* A Tribe is eligible to participate in the Program if—

(1) The Tribe requests participation in the Program by resolution or other official action by the governing body of the Tribe; and

(2) The Department determines, based on the evidence submitted by the Tribe, that, over the 3 most recent fiscal years, the Tribe has demonstrated financial stability and financial management capability, and transportation program management capability in accordance with the criteria specified in 23 U.S.C. 207(b) and this section.

(b) *Financial stability and financial management capability.* In making the eligibility determination under 23 U.S.C. 207(b), the Department must determine that a Tribe demonstrates financial stability and financial management capability. To assist the Department in determining whether a Tribe meets the financial stability and financial management capability criterion, a Tribe must satisfy one of the following evidence standards:

(1) *Conclusive evidence.* A Tribe subject to the Single Audit Act demonstrates financial stability and financial management capability by providing evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's self-

determination contracts or self-governance funding agreements with any Federal agency. This will be conclusive evidence that the Tribe has satisfied the financial stability and financial management capability criterion.

(2) *Sufficient evidence.* A Tribe subject to the Single Audit Act that has a TTP Agreement, or a grant award provided by the Department may provide evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in its required single audit of the Tribe's Federal award programs. This will be sufficient evidence that the Tribe has satisfied the financial stability and financial management capability criterion.

(3) *Evidence without a mandate to comply with the Single Audit Act.* If a Tribe is not subject to the Single Audit Act, a Tribe may provide evidence of the following for the Department's determination of whether the Tribe satisfies the financial stability and financial management capability criterion:

(i) An independent audit, consistent with 2 CFR 200.514, containing no uncorrected significant and material audit exceptions that covers the preceding 3 fiscal years of the Tribe's self-determination contracts or self-governance funding agreements with any Federal agency, TTP Agreements, or a grant award from the Department; and

(ii) Evidence demonstrating that the Tribe has financial management systems and standards that meet or exceed the standards set forth in §§ 29.505 through 29.511 and 29.515 of this part. The Department will confirm in writing within 90 days of receipt of any such submission by the Tribe whether the Tribe's management systems meet the required standards.

(c) *Transportation program management capability.* In making the eligibility determination under 23 U.S.C. 207(b), the Department also must determine that a Tribe demonstrates transportation program management capability, including the capability to manage and complete projects eligible under title 23 and chapter 53 of title 49 of the U.S. Code, based on the totality of the evidence that a Tribe submits to the Department.

(1) *Evidence of transportation management capability.* To assist the Department in determining whether a Tribe meets the transportation program management capability criterion, a Tribe may submit evidence including:

(i) Documentation showing that the Tribe has previously or is currently directing or carrying out transportation services, projects, or programs under a self-determination contract, self-governance compact, a TTP Agreement, or a grant award with the Department.

(ii) Documentation showing the extent to which the Tribe previously received Federal funding and carried out management responsibilities relating to the planning, design, delivery, construction, maintenance, or operation of transportation-related projects, and whether they were completed;

(iii) Documentation that the Tribe has established and maintains, as appropriate, a staffed and operational transportation or transit program, department, commission, board, or official of any Tribal government charged by its laws with the responsibility for transportation-related responsibilities, including administration, planning, maintenance, and construction activities. This documentation should identify the Tribal personnel, job descriptions, and expertise necessary to administer or implement PSFAs that the Tribe proposes to assume under the Program. The documentation may also include resolutions,

other authorizations, or proposed budgets demonstrating that the Tribe has taken steps to organize a Tribal office or department to address the transportation-related needs of the Tribe and how that entity has or will demonstrate transportation program management capacity; and

(iv) Documentation showing the completion of one or more transportation projects or operation of a program that is related to or similar to the PSFA the Tribe requests to include in a funding agreement negotiated between the Department and the Tribe. The Department will consider the number, complexity, and type of projects or programs that the Tribe has carried out and describes as part of this determination. This documentation should address the substantive involvement of the Tribe in operating a transportation program, which may be demonstrated by:

(A) Involvement in the development of a completed and approved highway safety plan;

(B) Involvement in the development of completed and approved plans, specifications, and estimates design package for one or more transportation projects to be carried out with available funding;

(C) Involvement in the delivery of a completed and approved transportation construction project using Federal or non-Federal funds;

(D) Oversight or operation of a public transit project or public transit system;

(E) Oversight or operation of a transportation maintenance system; or

(F) Other information that evidences the transportation program management capabilities of the Tribe.



(2) *Other indicia of program management capability.* In determining transportation program management capability, the Department will consider any other evidence that a Tribe may submit, including the operation by the Tribe of non-transportation programs of similar complexity, size, administrative need, staffing requirement, or budget.

(d) *Program eligibility determination.* The Department will make its determination of a Tribe's eligibility according to the following time frames:

(1) Within 30 days of receipt of a Tribe's submission seeking an eligibility determination under this section to participate in the Program, the Department will notify the Tribe in writing to confirm that it has received the submission and notify the Tribe whether any evidence necessary to make the determination is missing.

(3) Within 120 days of receipt of an initial submission, the Department will issue its determination of a Tribe's eligibility to participate in the Program. If the Tribe provides additional evidence to complete the application, the Department will have up to an additional 45 days after such submittal to issue its determination of the Tribe's eligibility to participate in the Program. The determination will constitute final agency action, which the Tribe may appeal in accordance with §§ 29.904 through 29.911.

(e) *Technical assistance.* A Tribe with one or more uncorrected significant and material audit exceptions may request technical assistance from the Department through the Self-Governance Official. To the extent feasible, the Department will provide technical assistance, such as feedback on management systems and standards or review of internal controls, with the goal of assisting the Tribe to establish eligibility for the Program. Where audit exceptions involve funding administered by another Federal agency, the Tribe will resolve those exceptions with that agency.

## *Negotiations*

### **§ 29.101 How does a Tribe commence negotiations for a compact, funding agreement, or amendment?**

After the Department notifies a Tribe in writing that it is eligible to participate in the Program pursuant to § 29.100, the Tribe must submit a written request to the Self-Governance Official to begin negotiating a compact and funding agreement. A Tribe participating in the Program may submit a written request to the Self-Governance Official at any time to begin negotiating an amendment. A Tribe may send the request to [ttsgp@dot.gov](mailto:ttsgp@dot.gov) or use any other method that provides receipt.

### **§ 29.102 What information should a Tribe provide to the Department when it expresses its interest in negotiating a compact, funding agreement, or amendment?**

After the Department notifies a Tribe in writing that it is eligible to participate in the Program pursuant to § 29.100, the Tribe may express its interest in negotiating a compact, funding agreement, or amendment by written request. Such request need only request that the Department enter into negotiations for a compact, funding agreement, or amendment. To the degree the Tribe has the following information available to it, the request may include, as appropriate:

- (a) Whether the Tribe wants to negotiate a compact, funding agreement, or amendment;
- (b) The funding programs that the Tribe wants to include in the funding agreement or amendment;
- (c) The terms the Tribe wants to include in the compact, funding agreement, or amendment;

(d) Any information or technical assistance the Tribe needs from the Department to assist in pursuing the negotiation process; and

(e) The Tribal official with authority to negotiate on behalf of the Tribe, the designated Tribal contact, relevant contact information, and, if applicable, the name and contact information of an attorney authorized to represent the interests of the Tribe in the negotiation.

**§ 29.103 How will the Department respond to a Tribe's written request?**

Within 15 days of receipt of a Tribe's written request, the Department will notify the Tribe in writing of the identity of the designated representative(s) of the Department who will conduct the negotiation and, to the extent feasible, will provide to the Tribe the information requested by the Tribe consistent with § 29.102(d).

**§ 29.104 Must the Department and a Tribe follow a specific process when negotiating compacts, funding agreements, and amendments?**

The Department and a Tribe do not have to follow a specific process when negotiating compacts, funding agreements, and amendments. The Department and the Tribe should cooperate to develop a plan to address each issue subject to negotiation and provide the representatives an opportunity to address the Tribal proposals, legal or program issues of concern, the time needed to complete the negotiations, and the development of a term sheet.

**§ 29.105 Will negotiations commence or conclude within a specified time period?**

Unless the Department and the Tribe agree otherwise, negotiations will commence within 60 days of the Department's receipt of the Tribe's written request to negotiate a compact, funding agreement, or amendment. The Department and the Tribe should make

every effort to conclude negotiations within 90 days from the date on which negotiations commence, unless they agree to extend the time period for negotiations. Negotiations may proceed by electronic mail, teleconferences, or in-person meetings.

**§ 29.106 What are best practices to pursue negotiations?**

(a) The Department and the Tribe should collaborate and provide a clear explanation of their positions and interests. Each party should provide timely and specific responses to proposals presented during negotiations in order to conclude negotiations as soon as possible within the period provided in § 29.105.

(b) In negotiating the applicable construction, design, monitoring, or health and safety requirements that apply to the PSFAs the Tribe carries out using funds included in a funding agreement, along with the other terms set forth in § 29.307, the Department and the Tribe should cooperate and the Department will prioritize the reduction of administrative requirements on the Tribe when negotiating the terms of the compact, funding agreement, or amendment to effectuate Tribal self-governance.

(c) The Department and the Tribe should conduct the negotiations in order to reach agreement on as many items as possible, and to refine unresolved issues in order to avoid disputed terms. The negotiations should conclude with mutually agreed upon terms and conditions. If any unresolved issues remain, the Tribe may submit a final offer to the Department under subpart C of this part.

**§ 29.107 What recourse does the Department or the Tribe have if the negotiations reach an impasse?**

The Department and the Tribe should resolve disagreements informally and by mutual agreement whenever possible. If the Department and the Tribe are unable to

reach agreement by the agreed upon date for completing negotiations, the Tribe may request to participate in an alternative dispute resolution process pursuant to § 29.901, or it may submit a final offer to the Self-Governance Official in accordance with subpart C of this part.

**§ 29.108 May the Department and the Tribe continue to negotiate after the Tribe submits a final offer?**

The Department and the Tribe may continue negotiations after the Tribe submits a final offer by mutual agreement, and may execute the remaining terms of the compact, funding agreement, or amendment not subject to the final offer, consistent with § 29.213.

**§ 29.109 Who is responsible for drafting the compact or funding agreement?**

It is the mutual obligation of the Department and the Tribe to draft the compact, funding agreement, or amendment. Either the Department or the Tribe may prepare the initial draft for the other party's review.

**Subpart C—Final Offer Process**

**§ 29.200 What is covered by this subpart?**

This subpart explains the final offer process for resolving, within a specific time frame, disputes that may develop in negotiation of a compact, funding agreement, or amendment.

**§ 29.201 In what circumstances should a Tribe submit a final offer?**

If the Department and a Tribe are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment, the Tribe may submit a final offer to the Department.

### **§ 29.202 How does a Tribe submit a final offer?**

(a) A Tribe must submit a written final offer to the Self-Governance Official to [ttsgp@dot.gov](mailto:ttsgp@dot.gov) or send the final offer using any other method that provides receipt to: Self-Governance Official, U.S. Department of Transportation, Office of the Secretary, Office of the Assistant Secretary for Governmental Affairs (I-10), 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

(b) The final offer should be a separate document from the compact, funding agreement, or amendment and clearly identified as a “Final Offer—Response due within 45 days of receipt.”

### **§ 29.203 What must a final offer contain?**

A final offer must contain a description of the disagreement between the Department and the Tribe, the Tribe’s final proposal to resolve the disagreement, including any draft proposed terms to be included in a compact, funding agreement, or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe. If the final offer is insufficient for the Department to make a decision, the Department will notify the Tribe and request additional information. A request for more information has no effect on deadlines for response.

### **§ 29.204 How many days does the Department have to respond to a final offer?**

The Department has 45 days to respond to the final offer. The 45-day review period begins on the date the Self-Governance Official receives the final offer.

### **§ 29.205 How does the Department acknowledge receipt of a final offer?**

Within 10 days of the Self-Governance Official receiving the final offer, the Department will send the Tribe an acknowledgement of the final offer, together with

documentation that indicates the date on which the Self-Governance Official received the final offer. The Department's failure to send the acknowledgement does not constitute approval of the final offer.

**§ 29.206 May the Department request and obtain an extension of time of the 45-day review period?**

The Department may request an extension of time before the expiration of the 45-day review period. The Tribe may either grant or deny the Department's request for an extension. Any grant of extension of time must be in writing and signed by a person authorized by the Tribe to grant the extension before the expiration of the 45-day review period.

**§ 29.207 What happens if the Department takes no action within the 45-day review period (or any extensions thereof)?**

The final offer is accepted by operation of law if the Department takes no action within the 45-day review period (or any extensions thereof).

**§ 29.208 What happens once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law?**

Once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law, the Department must add the terms of the Tribe's accepted final offer to the compact, funding agreement, or amendment, and transfer funds consistent with §§ 29.403 through 29.405.

***Rejection of Final Offers***

**§ 29.209 On what basis may the Department reject a Tribe's final offer?**

The Department may reject a Tribe's final offer for any of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Tribe is entitled;

(b) The subject of the final offer is an inherent Federal function that cannot legally be delegated to the Tribe;

(c) Carrying out the PSFA would result in significant danger or risk to public health or safety; or

(d) The Tribe is not eligible to participate in self-governance under section 23 U.S.C. 207(b).

**§ 29.210 How does the Department reject a final offer?**

The Department must reject a final offer by providing written notice to the Tribe based on the criteria in § 29.209 no more than 45 days after receipt of a final offer by the Self-Governance Official, or within a longer time period as agreed to by the Department and the Tribe consistent with this subpart. The notice must explain the basis for the rejection of the final offer.

**§ 29.211 Is technical assistance available to a Tribe to overcome rejection of a final offer?**

The Department must provide technical assistance to overcome the objections stated in the Department's rejection of a final offer.

**§ 29.212 May a Tribe appeal the rejection of a final offer?**

A Tribe may appeal the rejection of a final offer in accordance with §§ 29.904 through 29.911.

**§ 29.213 If a Tribe appeals a final offer, do the remaining provisions of the compact, funding agreement, or amendment not in dispute go into effect?**



If a Tribe appeals the rejection of a final offer, the Department and the Tribe may execute and make effective any non-disputed, severable provisions of the compact, funding agreement, or amendment that are not already executed and are not subject to appeal.

## **Subpart D—Contents of Compacts and Funding Agreements**

### *Compacts*

#### **§ 29.300 What is included in a compact?**

A compact only includes the general terms that govern a Tribe's participation in the Program and such other terms as the Department and the Tribe mutually agree that will continue to apply from year to year, and affirms the government-to-government relationship between the Department and the Tribe. Such terms include the authority, purpose, and obligations of the Department and the Tribe. The written compact memorializes matters on which the Department and the Tribe agree. The compact will not include language not agreed to by the Department and the Tribe.

#### **§ 29.301 Is a compact required to participate in the Program?**

A Tribe must have a compact in place to participate in the Program. A compact must be in effect between the Department and the Tribe before the Tribe may enter into a funding agreement with the Department. The Tribe may negotiate a compact at the same time it is negotiating a funding agreement, so long as the compact is executed prior to or concurrent with the funding agreement.

#### **§ 29.302 What is the duration of a compact?**

A compact remains in effect until it is terminated by mutual written agreement, retrocession, or reassumption under this part.

**§ 29.303 May more than one Tribe enter into a single compact and funding agreement?**

A consortium of two or more Tribes may participate in the Program by entering into a single compact and funding agreement on the same basis as an individual Tribe. A consortium may comprise a combination of one or more Tribes that may or may not be independently eligible under § 29.100, so long as the consortium is eligible.

**§ 29.304 May a compact be amended?**

A compact may be amended at any time by the mutual written agreement of the Department and the Tribe.

***Funding Agreements***

**§ 29.305 When can a Tribe initiate negotiation of a funding agreement?**

Concurrent with or after a Tribe has entered into a compact with the Department, the Department and the Tribe will negotiate a funding agreement, consistent with §§ 29.101 through 29.109. The funding agreement is the legally binding written agreement that identifies the funds the Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

**§ 29.306 What is the duration of a funding agreement?**

(a) The duration of a funding agreement is one year unless the Department and a Tribe negotiate a multi-year funding agreement or, for an initial funding agreement, a partial-year agreement.

(b) Each funding agreement will remain in full force and effect until the Department and the Tribe execute a subsequent funding agreement, except when:

(1) The Tribe provides notice to the Department that it is withdrawing or retroceding funds for the operation of one or more PSFAs (or portions thereof) identified in the funding agreement;

(2) The Department terminates the funding agreement under 23 U.S.C. 207(f)(2); or

(3) The Department and the Tribe agree otherwise.

**§ 29.307 What terms must a funding agreement include?**

A funding agreement must set forth the following:

(a) The funds the Department will provide, including those funds provided on a recurring basis;

(b) The PSFAs the Tribe intends to carry out using the funds;

(c) The general budget category assigned to the funds;

(d) The time and method of transfer of funds;

(e) The responsibilities of the Department and the Tribe;

(f) Any applicable statutory limitations on the use of funds;

(g) Any statutory or negotiated reporting requirements;

(h) Any applicable Federal or federally approved design, construction, and monitoring standards, or the Tribe's design, construction, and monitoring standards, if they are consistent with or exceed the Federal or federally approved standards;

(i) Other Federal health and safety requirements that apply to the funds included in the funding agreement, or the Tribe provides adequate assurance that its relevant health and safety requirements are consistent with or exceed such requirements;

(j) If the funding agreement includes TTP funds under 23 U.S.C. 202 and § 29.400(a), provisions related to planning, inventory, and allowable use of funds in 25 CFR part 170

necessary for administration of the TTP, consistent with the Program's goal to reduce administrative burdens on the Tribe, or Tribal provisions that meet or exceed those standards;

(k) Any other provision agreed to by the Department and the Tribe, such as program oversight, accountability, annual reporting on expenditure of Federal funds, and technical assistance; and

(l) Provisions authorizing the Department to terminate the funding agreement (in whole or in part) and reassume the remaining funding for transfer, as appropriate.

**§ 29.308 May the funding agreement include additional terms from title I of the Indian Self-Determination and Education Assistance Act?**

At a Tribe's request, the Department and the Tribe may incorporate into a compact or funding agreement any other provision of title I of the Indian Self-Determination and Education Assistance Act, unless the Department determines there is a conflict between the provision and 23 U.S.C. 207. The Department will make the determination consistent with 23 U.S.C. 207(j).

**§ 29.309 Will a funding agreement include provisions pertaining to flexible or innovative financing?**

If the Department and a Tribe agree, a funding agreement will include provisions pertaining to flexible financing and innovative financing. In that event, the Department and the Tribe will establish terms and conditions relating to the flexible and innovative financing provisions that are consistent with 23 U.S.C. 207(d)(2)(C).

**§ 29.310 How is a funding agreement amended?**

A funding agreement may be amended by the mutual written agreement of the Department and the Tribe as provided for in the funding agreement. The Department will not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Tribe, unless such terms are required by Federal law.

**§ 29.311 Is a subsequent funding agreement retroactive to the end of the term of the preceding funding agreement?**

When the Department and a Tribe execute a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

**Subpart E—Rules and Procedures for Transfer and Use of Funds**

**§ 29.400 What funds may a Tribe elect to include in a funding agreement?**

A Tribe may elect to include in a funding agreement the following funds:

- (a) Funds provided to the Tribe under the Tribal Transportation Program identified in 23 U.S.C. 202 in accordance with the statutory formula set forth in 23 U.S.C. 202(b);
- (b) Any transit funds provided to the Tribe under 49 U.S.C. 5311;
- (c) Funds for any discretionary or competitive grant administered by the Department awarded to the Tribe for a transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code;
- (d) Funds for any other discretionary or competitive grant for a transportation-related purpose administered by the Department otherwise available to the Tribe;
- (e) Federal-aid funds apportioned to a State under chapter 1 of title 23 of the U.S. Code if the State elects to transfer, pursuant to 23 U.S.C. 207(d)(2)(A)(ii) or 23 U.S.C. 202(a)(9), a portion of such funds to the Tribe for an eligible project; and

(f) Formula funds awarded to a State under 49 U.S.C. 5311 that the State elects to award to the Tribe, where the Tribe and State agree that the Department will award the funds directly to the Tribe.

**§ 29.401 What funds must the Department transfer to a Tribe in a funding agreement?**

(a) Subject to the terms of a funding agreement, the Department must transfer to a Tribe all the funds provided for in the funding agreement.

(b) The Department must provide funds for periods covered by a joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions. The Department will defer payment of funds to the Tribe if the period of continuing appropriations is less than 35 days.

(c) To the extent a Tribe elects to include the following funds in its funding agreement, the Department will include the amount equal to:

(1) The amount awarded to the Tribe for any discretionary or competitive grant;

(2) The amount transferred to the Tribe by a State;

(3) The sum of the funds that the Tribe would otherwise receive in accordance with a funding formula or other allocation method set forth in title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and

(4) Such additional amounts as the Department determines equal the amounts that would have been withheld, if any, for the costs of the Bureau of Indian Affairs to administer the program or project on behalf of the Tribe.

**§ 29.402 Is the Tribe responsible for the funds included in a funding agreement?**

The Tribe is responsible for implementing the Tribe's PSFAs using the funds included in a funding agreement and for administering the funds in accordance with this part. In addition, the Tribe must carry out its PSFAs in accordance with the funding agreement, and all applicable statutes and regulations identified in the funding agreement.

**§ 29.403 When must the Department transfer to a Tribe the funds identified in a funding agreement?**

When a funding agreement requires an annual transfer of funds to be made by the Department at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funds to be made to a Tribe, the Department will make the first transfer no later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department is not responsible for any interest penalty if the Department makes the transfer within 30 days.

**§ 29.404 When must the Department transfer funds that were not paid as part of the initial lump sum payment (or initial periodic payment)?**

The Department must transfer any funds that were not paid in the initial lump sum payment (or initial periodic payment) within 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department

is not responsible for any interest penalty if the Department makes the transfer within 30 days.

**§ 29.405 When must the Department transfer funds for a discretionary or competitive grant?**

If the Department selects a Tribe for a discretionary or competitive grant, and the Tribe elects to include the grant funds in its funding agreement, the Department will transfer the funds to the Tribe in accordance with the terms of the Notice of Funding Opportunity or as the Department and the Tribe may otherwise agree. The Department will transfer these funds no later than 10 days after the Department and the Tribe execute a funding agreement or an amendment covering the grant, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department is not responsible for any interest penalty if the Department makes the transfer within 30 days.

**§ 29.406 Does the award of funds for a discretionary or competitive grant entitle a Tribe to receive the same amount in subsequent years?**

The award of funds for a discretionary or competitive grant does not entitle a Tribe to receive the same amount of funds in subsequent years.

**§ 29.407 Does the award of funds for discretionary or competitive grants entitle the Tribe to receive contract support costs?**

Receipt of discretionary or competitive grant awards does not entitle the Tribe to receive contract support costs or any other amounts identified in 25 U.S.C. 5325.

However, a Tribe may use grant awards to cover overhead and administrative expenses associated with operation of the grant, as provided in the grant award.



**§ 29.408 How may a Tribe use interest earned on funds included in a funding agreement?**

A Tribe may retain interest earned on funds included in a funding agreement to carry out transportation or governmental functions.

**§ 29.409 May a Tribe carry over from one fiscal year to the next any funds that remain at the end of the funding agreement?**

A Tribe may carry over from one fiscal year to the next any funds that remain at the end of the funding agreement, consistent with the following:

(a) The period of availability for formula funds included in a funding agreement does not lapse. After transfer to the Tribe, such funds will remain available until expended. If a Tribe elects to carry over funds from one fiscal year to the next, such carryover funds will not diminish the amount of formula funds the Tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(b) The period of availability for discretionary or competitive grants are specific to the funding source and will be set forth in the funding agreement.

**§ 29.410 May a Tribe use remaining funds from a discretionary or competitive grant included in a funding agreement?**

A Tribe may use remaining funds from a discretionary or competitive grant included in a funding agreement, but only with written approval from the Department. The Department must determine that the use of such funds is consistent with the statutory requirements of the grant program, including purpose and time, and is for the project for which the grant was provided.

**§ 29.411 Are funds included in a compact and funding agreement non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?**

Notwithstanding any other provision of law, pursuant to 25 U.S.C. 5325(j), funds included in a compact and funding agreement are considered non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

**§ 29.412 May the Department increase the funds included in the funding agreement if necessary to carry out the Program?**

The Department may increase the funds included in the funding agreement if necessary to carry out the Program. However, the Department and the Tribe must agree to any transfer of funds to the Tribe unless otherwise provided for in the funding agreement.

**§ 29.413 How will the Department assist a Tribe with its credit requests?**

At the request of a Tribe that has applied for a loan or other credit assistance from a State infrastructure bank or other financial institution to complete an eligible transportation-related project with funds included in a funding agreement, the Department will provide documentation in its possession or control to assist the Tribe.

**§ 29.414 What limitations apply to Department actions related to transfer of funds associated with PSFAs?**

The Department will not:

(a) Fail or refuse to transfer to a Tribe its full share of funds due under the Program, except as required by Federal law;

- (b) Withhold portions of such funds for transfer over a period of years;
- (c) Reduce the amount of funds identified for transfer in a funding agreement to make funding available for self-governance monitoring or administration by the Department;
- (d) Reduce the amount of funds included in a funding agreement in subsequent years, except pursuant to:
  - (1) A reduction in appropriations from the previous fiscal year or a change in the funding formula;
  - (2) A congressional directive in legislation or accompanying report;
  - (3) A Tribal authorization;
  - (4) A change in the amount of pass-through funds;
  - (5) Completion of a project, activity, or program for which discretionary or competitive grant funds were provided;
  - (6) Expenditure of all discretionary or competitive grant funds authorized by the Department under separate statutory authorities for an eligible project, activity, or program; or
  - (7) A final decision by the Department pursuant to subpart I to terminate a compact or funding agreement (or portions thereof) due to a finding of gross mismanagement or imminent jeopardy.
- (e) Reduce the amount of funds identified in a funding agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Program, except that such prohibition is inapplicable when Congress authorizes the Department to

set aside a portion of the funds for Department project monitoring and oversight related functions; or

(f) Reduce the amount of funds required under the Program to pay for costs of Federal personnel displaced by compacts and funding agreements.

**§ 29.415 Does the Prompt Payment Act apply to funds included in a funding agreement?**

The Prompt Payment Act, 31 U.S.C. 3901 *et seq.*, applies to the transfer of funds under the Program.

**§ 29.416 What standard applies to a Tribe's management of funds included in a funding agreement?**

(a) A Tribe must invest and manage funds included in a funding agreement as a prudent investor would, in light of the purpose, terms, distribution requirements, and applicable provisions, in the compact and funding agreement. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suited to the Tribe. In making and implementing investment decisions, the Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so.

(b) A Tribe must:

(1) Conform to fundamental fiduciary duties of loyalty and impartiality;

(2) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(3) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe.

**§ 29.417 Must a Tribe continue performance of the Tribal Transportation Program or the Tribal Transit Program under a compact and funding agreement if the Department does not transfer sufficient funds?**

A Tribe does not have to continue performance of the Tribal Transportation Program (23 U.S.C. 202(b)) or the Tribal Transit Program (49 U.S.C. 5311(c)(1)) that requires an expenditure of funds in excess of the amount of funds included in a funding agreement. If at any time the Tribe has reason to believe that the total amount included in a funding agreement is insufficient, the Tribe must provide reasonable notice of such insufficiency to the Self-Governance Official. If the Department does not increase the amount of funds included in the funding agreement for the Tribal Transportation Program or Tribal Transit Program, the Tribe may suspend performance of the program activity until such time as the Department transfers additional funds.

**§ 29.418 May a funding agreement include transfers of State funds?**

(a) A State may elect to provide a portion of Federal-aid funds apportioned to the State under chapter 1 of title 23 of the U.S. Code to an eligible Tribe for a project eligible under 23 U.S.C. 202(a).

(b) If a State provides such funds, the transfer may occur in accordance with 23 U.S.C. 202(a)(9), 23 U.S.C. 207(d)(2)(A)(ii), or the State may transfer the funds to the

Department, and the Department will transfer the funds to the participating Tribe through the Tribe's funding agreement.

(c) If a State provides such funds, the Tribe (and not the State) will be responsible for:

(1) Constructing and maintaining any projects carried out using the funds;

(2) Administering and supervising the projects and funds in accordance with 23 U.S.C. 207;

(3) Complying with applicable post-construction requirements.

(d) The receipt of any State funds transferred at the election of a State to the Tribe pursuant to 23 U.S.C. 202(a)(9), 23 U.S.C. 207(d)(2)(A)(ii), or funds awarded to a State pursuant to 49 U.S.C. 5311 that are transferred at the election of a State to the Federal Transit Administration for the benefit of a Tribe does not entitle the Tribe to receive contract support costs under 25 U.S.C. 5325(a). While a Tribe is not entitled to additional funds for contract supports costs, a Tribe may use a portion of such State funds for overhead and administrative expenses if such costs are reasonable, allowable, and allocable in accordance with 2 CFR part 200 and the statutory and regulatory requirements applicable to the funding source.

**§ 29.419 Does the award of formula funds entitle a Tribe to receipt of contract support costs?**

The award of formula funds does not entitle a Tribe to receive contract support costs under 25 U.S.C. 5325(a). A funding agreement will not provide additional funds for contract support costs to carry out PSFAs. While a Tribe is not entitled to additional funds for contract support costs, a Tribe may use a portion of its formula funds (§ 29.400(a) and (b)) for overhead and administrative expenses if such costs are

reasonable, allowable, and allocable in accordance with 2 CFR part 200 and the statutory and regulatory requirements applicable to the funding source.

**§ 29.420 Is a Tribe entitled to enter into facility leases from the Department and to receive facility support costs?**

A Tribe is not entitled to enter into facility leases with the Department and receive facility support costs. A funding agreement will not provide additional funds for facility leases and facility support costs to carry out PSFAs. However, facility leases and facility support costs may be an eligible and allowable use of funds a Tribe receives under a funding agreement.

**§ 29.421 May a Tribe redesign, consolidate, reallocate, or redirect the funds included in a funding agreement?**

(a) A Tribe may redesign, consolidate, reallocate, or redirect funds included in a funding agreement in any manner it considers to be in the best interest of the Indian community being served, provided that:

(1) The funds are expended on projects identified in a transportation improvement program approved by the Department, where statutorily required; and

(2) The funds are used in accordance with the requirements in appropriations acts, title 23 of the U.S. Code, chapter 53 of title 49 of the U.S. Code, and any other applicable law.

(b) Consistent with 23 U.S.C. 207(e)(1)(B), a Tribe may not redesign, consolidate, reallocate, or redirect any discretionary or competitive grant funds or State transfers of funds that are included in the funding agreement. A Tribe may use remaining funds from a discretionary or competitive grant in accordance with § 29.410.

## **Subpart F—Program Operations**

### *Audits and Cost Principles*

#### **§ 29.500 Must a Tribe undertake an annual audit?**

A Tribe that meets the applicable thresholds under 2 CFR 200.501 must undertake an annual audit pursuant to the regulations set forth in 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, except to the extent that part 200 exempts a Tribe from complying with the audit requirements.

#### **§ 29.501 Must a Tribe submit any required audits to the Federal Audit Clearinghouse and the Department?**

A Tribe must submit any required audits to the Federal Audit Clearinghouse pursuant to the Office of Management and Budget procedures and provide prompt notice to the Department it has done so.

#### **§ 29.502 Who is responsible for compiling, copying, and paying for materials for any audit or examination?**

The agency or entity undertaking the examination or audit will be responsible for all costs associated with an audit or examination of Tribal records. A Tribe is responsible for making records available during regular business hours, and may prevent removal of the records from Tribal offices. If an agency or entity undertaking the examination or audit requests that the Tribe make copies of records for its use, the Tribe must do so, but



may charge the examining agency reasonable per-page fees for photocopying or scanning of documents and records.

**§ 29.503 How may the Federal Government make a claim against a Tribe relating to any disallowance of costs based on an audit conducted under this part?**

(a) *Disallowance of costs.* Any claim by the Federal Government against a Tribe relating to funds included in a funding agreement based on any audit conducted pursuant to this part is subject to 25 U.S.C. 5325(f).

(1) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Department provides notice of such a disallowance within 365 days from receiving any required annual audit report. The notice must set forth the Tribe's appeal and hearing rights in accordance with §§ 29.912 through 29.923.

(2) To calculate the 365-day period, an audit report is deemed received by the Department on the date of electronic submission to the Federal Audit Clearinghouse. The Department has 60 days after receiving the audit report to give notice to the Tribe of its determination to reject an audit report as insufficient due to non-compliance with the applicable provisions of 2 CFR part 200 or any applicable statute.

(b) *Criminal penalties.* Any person, officer, director, agent, employee, or person otherwise connected with a recipient of a contract, subcontract, grant, or sub-grant under a compact or funding agreement who embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property provided to the recipient will be fined not more than \$10,000 or imprisoned for not more than 2 years, or both. If the

amount of funds in question does not exceed \$100, then the fine will be no more than \$1,000 and imprisonment not more than 1 year, or both.

**§ 29.504 What cost principles must a Tribe apply in compacts and funding agreements?**

(a) A Tribe must apply the applicable cost principles of the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR part 200, except as modified by:

(1) 25 U.S.C. 5325(k), which sets forth certain categories of allowable uses of funds that a Tribe may include in a funding agreement provided that such use supports implementation of a PSFA;

(2) Other provisions of Federal law; or

(3) Any subsequent exemptions granted by the Office of Management and Budget.

(b) The Department may not require a Tribe to apply other audit or accounting standards.

***Standards for Tribal Management Systems***

**§ 29.505 What are the financial management systems that a Tribe carrying out a compact and funding agreement must develop, implement, and maintain to ensure the proper expenditure and accounting of Federal funds?**

(a) *Generally.* To ensure the proper expenditure and accounting of Federal funds, a Tribe carrying out a compact and funding agreement must develop, implement, and maintain financial management systems that meet the financial standards and minimum

requirements set forth in §§ 29.506 and 29.507, unless the Department waives, in whole or in part, one or more of the standards.

(b) *Applicability to Tribal contractors.* A Tribe may require that its contractors comply with some or all of the standards and requirements in §§ 29.506 and 29.507 when the Tribe retains contractors to assist in carrying out the requirements of a funding agreement.

(c) *Evaluation.* When required under 2 CFR part 200, an independent auditor retained by a Tribe must evaluate the financial management systems of the Tribe through an annual audit report in accordance with the Single Agency Audit Act, 31 U.S.C. 7501–7506.

**§ 29.506 What standards apply to a Tribe’s financial management systems when carrying out a compact and funding agreement?**

The following standards apply to a Tribe’s financial management systems when carrying out a compact and funding agreement:

(a) The system must expend and account for funds included in a funding agreement in accordance with:

- (1) The compact and funding agreement;
- (2) All statutory requirements applicable to the funding source; and
- (3) Applicable provisions of 2 CFR part 200.

(b) The fiscal control and accounting procedures of a Tribe’s financial management system must be sufficient to:

- (1) Permit the preparation of reports required by applicable Federal law, the compact, funding agreement, and this part; and

(2) Permit the tracing of program or project funds to a level of expenditure adequate to establish that the funds have not been used in violation of any restrictions or prohibitions contained in any statute or provision of 2 CFR part 200 that applies to the funds included in the compact and funding agreement.

**§ 29.507 What minimum requirements must a Tribe's financial management system include to meet the standards set forth in § 29.506?**

To meet the standards set forth in § 29.506, a Tribe's financial management system must include the following minimum requirements:

(a) *Financial reports.* The financial management system must provide for accurate, current, and complete disclosure of the financial results of activities carried out by a Tribe under a compact and funding agreement;

(b) *Accounting records.* The financial management system must maintain records sufficiently detailed to identify the source and application of funds transferred to a Tribe in a funding agreement. The system must contain sufficient information to identify awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income;

(c) *Internal controls.* The financial management system must maintain effective control and accountability for all funds included in a funding agreement and for all Federal real property, personal property, and other assets furnished for use by a Tribe under its compact and funding agreement;

(d) *Budget controls.* The financial management system must permit the comparison of actual expenditures or outlays with the amounts budgeted by a Tribe for each funding agreement;

(e) *Allowable costs.* The financial management system must be sufficient to determine that the expenditure of funds is reasonable, allowable, and allocable based upon the terms of the compact and funding agreement and applicable provisions of 2 CFR part 200;

(f) *Source documentation.* The financial management system must contain accounting records that are supported by source documentation, such as canceled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that support expenditures; and

(g) *Cash management.* The financial management system must provide for accurate, current, and complete disclosure of cash revenues disbursements, cash-on-hand balances, and obligations by source and application for a Tribe so that complete and accurate cash transactions may be prepared by the Tribe.

**§ 29.508 What procurement standards apply to contracts carried out using funds included in a funding agreement?**

(a) Each contract carried out using funds included in a funding agreement must, at a minimum:

- (1) Be in writing;
- (2) Identify the interested parties, their respective roles and responsibilities, and the purposes of the contract;
- (3) State the work to be performed under the contract;
- (4) State the process for making any claim, the payments to be made, and the terms of the contract; and
- (5) State that it is subject to 25 U.S.C. 5307(b) consistent with § 29.524.

(b) A Tribe that chooses to use a procurement method that is not provided for in its established procurement management standards in the delivery of a Tribal transportation project must submit the request to deviate from these standards to the Department for review and approval in accordance with § 29.515. The deviation request must specify the procurement method that the Tribe proposes to use and the project to which such method will be applied.

**§ 29.509 What property management systems and standards must a Tribe maintain?**

(a) *Property management system.* A Tribe must maintain a property management system to account for all property acquired with funds included in a funding agreement, acquired with Federal funds awarded by the Department or the Department of the Interior, or obtained as excess or surplus Federal property to be used for activities under the Program. The property management system must address the use, care, maintenance, and disposition of such property as follows:

- (1) Where title vests in the Tribe, in accordance with Tribal law and procedures; or
- (2) In the case of a consortium, according to the internal property procedures of the consortium.

(b) *Transit asset management.* In addition to the property management system and standards in this section, property acquired with transit funds (chapter 53 of title 49 of the U.S. Code) is subject to the property management requirements set forth in 49 U.S.C. 5326 concerning the transit asset management plan, performance targets, and reports.

(c) *Tracking requirements under a property management system.* The property management system of a Tribe relating to property used under the Program must track:

(1) Personal property and rolling stock with an acquisition value in excess of \$5,000 per item;

(2) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Tribe; and

(3) Real property.

(d) *Records.* The property management system must maintain records that accurately describe the property, including any serial number, vehicle identification number, or other identification number. These records should contain current information such as the source, titleholder, acquisition date, acquisition cost, share of Federal participation in the cost, location, use and current condition of the property, and the date of disposal and sale price, if any.

(e) *Internal controls.* The property management system must maintain effective internal controls that include, at a minimum, procedures for a Tribe to:

(1) Conduct periodic, physical inventories at least once every 2 years and reconcile such inventories with the Tribal internal property and accounting records;

(2) Prevent loss or damage to property; and

(3) Ensure that property is used by the Tribe to carry out activities under a funding agreement until the Tribe declares the property excess to the needs of the PSFAs carried out by the Tribe under the funding agreement, consistent with the property management system of the Tribe.

(f) *Maintenance requirements.* Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the Department and the Tribe in any express warranties or guarantees covering the property.

(g) *Disposition of personal property acquired under a funding agreement.* Prior to disposition of any personal property acquired under a funding agreement, including rolling stock, a Tribe must report to the Self-Governance Official in writing on the property's status (e.g., worn out, lost, stolen, damaged beyond repair, or no longer needed to carry out activities under a funding agreement). The Department will provide disposition instructions in accordance with 2 CFR 200.313. A Tribe may retain, sell, or otherwise dispose of personal property with a current per unit fair market value of \$5,000 or less with no further obligation to the Department.

(h) *Disposition of real property acquired under a funding agreement.* Prior to disposition of any real property acquired under a funding agreement, a Tribe must report to the Self-Governance Official, who will ensure the Department provides disposition instructions in accordance with 2 CFR 200.311.

### ***Records***

#### **§ 29.510 Must a Tribe maintain a recordkeeping system?**

A Tribe must maintain records and provide Federal agency access to those records as provided in 25 U.S.C. 5386(d) and the statutory requirements of the funds included in a funding agreement.



**§ 29.511 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?**

(a) Except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe retained by the Tribe will not be considered Federal records for purposes of chapter 5 of title 5 of the U.S. Code.

(b) Tribal records submitted to the Department are considered Federal records for the purposes of the Freedom of Information Act (FOIA) and Federal Privacy Act. If a Tribe provides information to the Department that the Tribe considers to be trade secret, or confidential commercial or financial information, the Tribe must identify it as such. The Department will not disclose the information to the public, except to the extent required by law. In the event the Department receives a FOIA request for such information, the Department will follow the procedures described in its FOIA regulations at 49 CFR part 7.

**§ 29.512 Must a Tribe make its records available to the Department?**

After 30 days advance written notice from the Department, a Tribe must provide the Department with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements.

**§ 29.513 How long must a Tribe keep and make available records?**

A Tribe must keep books, documents, papers, and records of funding, grants, and State-provided funds for 3 years from the date of submission of the Single Audit Act audit report and provide the Department or the Comptroller General access to such records for audit and examination related to compacts, funding agreements, grants, contracts, subcontracts, sub-grants, or other arrangements under the Program.

## *Procurement*

### **§ 29.514 When procuring property or services with funds included in a funding agreement, can a Tribe follow its own procurement standards?**

When procuring property or services with funds included in a funding agreement, a Tribe must have standards that conform to the procurement standards in this subpart. If a Tribe relies upon procurement standards different than those described in § 29.515, it must identify the standards it will use in the initial negotiation of a funding agreement or as a waiver request to an existing funding agreement. The Tribe must submit the request to the Department in accordance with § 29.534.

### **§ 29.515 What are the minimum procurement standards that a Tribe must follow when procuring property or services with funds included in a funding agreement?**

A Tribe must follow the minimum procurement standards set forth in this section when procuring property or services with funds included in a funding agreement.

(a) *Minimum procurement standards.* (1) A Tribe must ensure that its vendors and contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase agreements or orders.

(2) A Tribe must maintain written standards of conduct governing the performance of its employees who award and administer contracts paid for using funds included in a funding agreement.

(i) An employee, officer, elected official, or agent of a Tribe must not participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, as defined in the conflict of interest policies of the Tribe, would be involved.

(ii) Employees, officers, elected officials, or agents of a Tribe, or of a subcontractor of the Tribe, must not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, except that the Tribe may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(iii) The standards must also provide for penalties, sanctions, or other disciplinary actions for violations of the procurement standards.

(3) A Tribe must review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Tribe should consider consolidating or separating out procurement to obtain more economical purchases. Tribes are encouraged to realize economies of scale in the procurement of goods, services, and supplies under this part, including the negotiation of cooperative agreements with other public authorities. Where appropriate, the Tribe must compare leasing and purchasing alternatives to determine which is more economical.

(4) A Tribe must conduct all major procurement transactions that exceed the simplified acquisition threshold set forth in 2 CFR 200.88 by providing full and open competition to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(i) Consistent with 2 CFR 200.88, a Tribe may develop its own definition for a simplified acquisition threshold.

(ii) To the greatest extent feasible, a Tribe must apply to any procurement award the Indian preference requirements for wages and grants contained in 25 U.S.C. 5307(b).

(5) A Tribe must make procurement awards only to responsible entities with the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Tribe will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(6) A Tribe must maintain records on the significant history of all major procurement transactions. These records must include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(7) A Tribe is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

(i) The settlement of any protest, dispute, or claim will not relieve the Tribe of any obligations under a funding agreement.

(ii) Violations of law must be referred to the Tribal or Federal authority having proper jurisdiction.

(b) *Conflicts of interest.* A Tribe participating in the program must ensure that internal measures and controls are in place to address conflicts of interest in the administration of compacts and funding agreements.

**§ 29.516 Do Federal laws and regulations apply to a Tribe's contractors or subcontractors?**

A Tribe's contractors or subcontractors are responsible for complying with Federal laws and regulations. Contracts between a Tribe and its contractors should inform contractors that the contract is carried out using funds included in a funding agreement, and that the contractors and its subcontractors are responsible for identifying and ensuring compliance with applicable Federal laws and regulations. The Department and the Tribe may, through negotiation, identify all or a portion of such requirements in the funding agreement and, if so identified, these requirements should be identified in the contracts the Tribe awards using funds included in a funding agreement.

**§ 29.517 Can a Tribe use Federal supply sources in the performance of a compact and funding agreement?**

A Tribe and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) in the performance of a compact and funding agreement to the same extent as if the Tribe were a Federal agency. The Department will assist the Tribes, to the extent feasible, to resolve any barriers to full implementation.

***Reporting***

**§ 29.518 What reporting must a Tribe provide?**

(a) A Tribe must provide reports mandated by statute associated with the funds included in the funding agreement. In accordance with § 29.307, the funding agreement will list these reporting requirements. The Tribe will cooperate with the Department to assist the Department in complying with its statutory reporting requirements. No additional reporting will be required of the Tribe.

(b) Notwithstanding paragraph (a) of this section, if the Tribe includes funds for a discretionary or competitive grant in a funding agreement, the Department and the Tribe will negotiate the appropriate reporting requirements to include in the funding agreement.

### ***Property***

#### **§ 29.519 How may a Tribe use existing Department facilities, equipment, or property?**

At the request of a Tribe, the Department will permit the Tribe to use and maintain existing facilities, equipment therein or appertaining thereto, and other personal property, if applicable, owned by the Government within the Department's jurisdiction, subject to terms and conditions agreed to by the Department and the Tribe. The requested facilities, equipment, or property must be used to carry out the Tribe's PSFAs under the compact and funding agreement. Such facilities, equipment, or other personal property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such facilities, equipment, other personal property. The Department will exercise discretion in a way that gives the maximum effect to the request of the Tribe to use such facilities, equipment, or property.

#### **§ 29.520 How may a Tribe acquire surplus or excess Federal property for use under the Program?**

A Tribe may acquire any surplus or excess property for use in the performance of the compact and funding agreement consistent with the procedures established by the General Services Administration. The Tribe must notify the Self-Governance Official of

the surplus or excess property it proposes to acquire and the purpose for which it will be used in the performance of the compact or funding agreement. If the Department participates in the acquisition by the Tribe of any excess or surplus Federal property, the Department will expeditiously process the request and assist the Tribe in its acquisition to the extent feasible and exercise discretion in a way that gives maximum effect to the Tribe's request for donation of the excess or surplus Federal property. When the Department's participation is required, the Department should expeditiously request acquisition of the property from the General Services Administration or the holding agency, as appropriate, by submitting the necessary documentation prior to the expiration of any "freeze" placed on the property by the Tribe or the Department on the Tribe's behalf. The Tribe must take title to any property acquired pursuant to this section. Such surplus or excess property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such surplus or excess property.

**§ 29.521 How must a Tribe use surplus or excess Federal property acquired under the Program?**

A Tribe must use any property acquired under this section in a manner consistent with the justification submitted at acquisition. The Tribe should notify the Self-Governance Official whenever use of the property changes significantly and upon disposal or sale.

**§ 29.522 If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, may the Department reacquire title to property**

**purchased with funds under any compact and funding agreement or excess or surplus Federal property that was donated to the Tribe under the Program?**

If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, the Tribe retains title to the property purchased with funds under any compact and funding agreement or excess or surplus Federal property donated under the Program if it is valued at \$5,000 or less. If the value of the property is over \$5,000 at the time of retrocession, withdrawal, or reassumption, title to such property may revert to the Department at the Department's discretion.

***Technical Assistance***

**§ 29.523 What technical assistance is available to a Tribe from the Department?**

Upon the written request of a Tribe, and to the extent feasible, the Department will provide technical assistance, including periodic program reviews, to assist a Tribe improve its performance in carrying out the Program.

***Prevailing Wages***

**§ 29.524 Do the wage and labor standards in the Davis-Bacon Act apply to employees of a Tribe?**

Wage and labor standards of the Davis-Bacon Act do not apply to employees of a Tribe. However, Davis-Bacon wage rates apply to all Tribal contractors and subcontractors.

***Tribal Preference***

**§ 29.525 Does Indian preference apply to PSFAs under the Program?**

To the greatest extent feasible, any contract, subcontract, grant, or sub-grant under a compact and funding agreement must give preference for employment and training, and



the award of subcontracts and sub-grants, to Indians, Indian organizations, and Indian-owned economic enterprises, as defined in 25 U.S.C. 1452.

**§ 29.526 When do Tribal employment law and contract preference laws govern?**

To the extent provided in applicable Federal law, Tribal law governs Indian preference policies in the performance of a compact and funding agreement. When a compact or funding agreement is intended to benefit one Tribe, the Tribal employment or contract preference laws adopted by such Tribe will govern with respect to the administration of the compact and funding agreement.

***Environmental and Cultural Resource Compliance***

**§ 29.527 What compliance with environmental and cultural resource statutes is required?**

(a) The Department must meet the requirements of applicable Federal environmental and cultural resource laws, such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act, for a proposed project under the Program.

(b) The Secretary has delegated environmental and cultural resource compliance responsibilities to the Operating Administrations, as appropriate. As such, an Operating Administration will serve as the lead agency responsible for final review and approval of environmental documents, and any associated environmental determinations and findings

for a proposed project under the Program. The Secretary, as delegated to the Operating Administrations, is also responsible for making determinations and issuing approvals in accordance with 23 U.S.C. 138 and 49 U.S.C. 303 (Section 4(f)), as applicable. Tribes may consult with the Self-Governance Official to determine which Operating Administration should serve as the lead agency.

(c) If the Department is conducting the environmental review process for a proposed project under the Program, the Tribe must assist the Department to satisfy the requirements of applicable Federal environmental and cultural resource laws.

(d) A Tribe may manage or conduct the environmental review process for a proposed project under the Program and may prepare drafts of the appropriate environmental review documents for submission to the Department.

(1) A Tribe may follow its own environmental review procedures if the procedures and documentation also satisfy the Federal environmental review requirements applicable to the project. A Tribe should work with the Operating Administration serving as lead agency to ensure the Tribal process will satisfy all applicable Federal environmental review requirements.

(2) The Operating Administration serving as lead agency must determine that the Tribe's process and documentation satisfy the applicable Federal environmental review requirements.

(e) As resources permit and at the request of a Tribe, the Department will provide advice and technical assistance to the Tribe to assist in the management of the Federal environmental review process and preparation of environmental documents.

(f) Unless prohibited by law, a Tribe may use funds included in a funding agreement to pay for environmental review activities.

### ***Federal Tort Claims Act***

#### **§ 29.528 Is the Federal Tort Claims Act applicable to a Tribe when carrying out a compact and funding agreement?**

(a) Section 314 of Public Law 101–512 and 25 U.S.C. 5396(a) incorporated by 23 U.S.C. 207(l)(8) make the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401, 2671–2680, applicable to a Tribe carrying out a compact and funding agreement.

(b) Contractors, subcontractors, or sub-recipients of a Tribe are not subject to the terms and conditions of the FTCA. The Tribe may use the regulations set forth in 25 CFR part 900, subpart M, as guidance on the Tribe’s rights and responsibilities under the FTCA. Accordingly, the Tribe must include, in any contract entered into with funds provided under a compact and funding agreement, a requirement that contractors, sub-contractors, or sub-recipients maintain applicable insurance coverage, such as workers compensation, auto, and general liability insurance, consistent with statutory minimums and local industry standards.

#### **§ 29.529 What steps should a Tribe take after becoming aware of a Federal Tort Claim?**

(a) Immediately after receiving a claim or a summons and complaint filed under the FTCA, the Tribe must notify the Self-Governance Official at [ttsgp@dot.gov](mailto:ttsgp@dot.gov) or use any other method that provides receipt.

(b) The Tribe, through a designated tort claims liaison assigned by the Tribe, must assist the Department in preparing a comprehensive and factually based report, which will inform the Department's report to the U.S. Department of Justice.

(c) The Tribe's designated tort claims liaison must immediately provide the following significant details of the event and include, as appropriate and to the extent within their knowledge, possession, or control:

- (1) The date, time, and exact place of the accident or incident;
- (2) A concise and complete statement of the circumstances of the accident or incident;
- (3) The names and addresses of Tribal or Federal employees involved as participants or witnesses;
- (4) The names and addresses of all other eyewitnesses;
- (5) An accurate description of all Federal, Tribal, and privately owned property involved, and the nature and amount of damage, if any;
- (6) A statement as to whether any person involved was cited for violating a Federal, State, or Tribal law, ordinance, or regulation;
- (7) The Tribe's determination as to whether any of its employees (including Federal employees assigned to the Tribe) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the funding agreement at the time the incident occurred;
- (8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats, and photographs of

the site or damaged property, that may be necessary or useful for the Department to determine the claim; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The Tribe must cooperate with and provide all necessary assistance to the U.S. Department of Justice and the Department's attorneys assigned to defend the tort claim including case preparation, discovery, and trial.

(e) If requested by the Department, the Tribe must make an assignment and subrogation of all the Tribe's rights and claims (except those against the Federal Government) arising out of a tort claim against the Tribe.

(f) If requested by the Department, the Tribe must authorize representatives of the Department to settle or defend any claim and to represent the Tribe in or take charge of any action. If the Federal Government undertakes the settlement or defense of any claim or action, the Tribe must provide all reasonable additional assistance in reaching a settlement or asserting a defense.

**§ 29.530 Is it necessary for a compact or funding agreement to include any terms about FTCA coverage?**

Terms about FTCA coverage are optional in a compact or funding agreement, and the FTCA applies even if terms regarding FTCA are not included in a compact or funding agreement.

**§ 29.531 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the compact and funding agreement?**

Subject to FTCA limitations, the FTCA covers employees of the Tribe who are not paid from compact and funding agreement funds as long as the services out of which the claim arose were performed in carrying out a compact and funding agreement.

**§ 29.532 May persons who are not Indians assert claims under FTCA?**

Any aggrieved person may assert claims for alleged torts arising from activities performed in carrying out compacts and funding agreements.

**§ 29.533 Does the year PSFAs are funded affect FTCA coverage?**

The year the funding was provided has no effect on the application of the FTCA.

***Waiver of Program Regulations***

**§ 29.534 What is the process for regulation waivers under this part?**

(a) A Tribe may request a waiver of a regulation in this part with respect to a compact or funding agreement. The Tribe must submit the request in writing to the Self-Governance Official to [ttsgp@dot.gov](mailto:ttsgp@dot.gov) or use any other method that provides receipt, at the following address: Self-Governance Official, U.S. Department of Transportation, Office of the Secretary [INSERT MAIL CODE], 1200 New Jersey Avenue, S.E., Washington, D.C. 20590. The request must be marked with the words “REQUEST TO WAIVE REGULATIONS” on the first page of the request and on the envelope enclosing the request (or in the subject line if by electronic mail). The request must identify the regulation subject to the waiver request, the language the Tribe seeks to waive, and the basis for the request.

(b) Within 10 days of receipt of the waiver request, the Self-Governance Official will send the Tribe an acknowledgement of the waiver request, together with a date-stamped cover sheet that indicates the date on which the Department received the waiver request.

(c) No later than 90 days after the date of receipt of a written request under paragraph (a) of this section, the Department must approve or deny the request in writing. If the application for a waiver is denied, the Department must provide the Tribe with the reasons for the denial as part of the written response.

(d) The Department will consider the following factors in making its decision on a waiver request:

- (1) Whether the waiver is contrary to Federal law;
- (2) The extent to which the waiver provides flexibility to facilitate the implementation of the Program at the Tribal level consistent with the principles of self-governance;
- (3) The extent to which the Tribe will benefit from the waiver; and
- (4) Whether the waiver is consistent with Federal transportation policy.

(e) If the Department does not approve or deny a request submitted under paragraph (a) of this section on or before the last day of the 90-day period, the request will be deemed approved by operation of law.

(f) A decision by the Department on a waiver request is a final agency action subject to judicial review under the Administrative Procedure Act.

## **Subpart G—Withdrawal**

### **§ 29.600 May a Tribe withdraw from a consortium?**

A Tribe may fully or partially withdraw from a consortium in accordance with any applicable terms and conditions of a consortium agreement with the Tribe. The withdrawing Tribe must provide written notification to the consortium and the Department of its decision to withdraw.

### **§ 29.601 When does a withdrawal from a consortium become effective?**

A withdrawal from a consortium becomes effective within the time frame specified in the resolution that authorizes the Tribe to withdraw from the consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Department, the withdrawing Tribe, and the consortium that has executed the compact and funding agreement.

**§ 29.602 How are funds redistributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe and elects to enter into a compact and funding agreement with the Department?**

A withdrawing Tribe that is eligible for the Program under 23 U.S.C. 207(b) and § 29.100 may negotiate and enter into a compact and funding agreement for its share of funds supporting those PSFAs that the Tribe will carry out. The share of funds is calculated on the same basis as the funds were initially allocated in the funding agreement of the consortium, unless otherwise agreed to by the consortium and the Tribe.

**§ 29.603 How are funds distributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe, and the withdrawing Tribe elects not to or is ineligible to enter into a compact and funding agreement?**

Unless otherwise agreed to by the consortium and the withdrawing Tribe, the consortium must return to the Department all funds not obligated and expended by the



consortium associated with the withdrawing Tribe when the withdrawing Tribe elects not to or is ineligible to enter into a compact and funding agreement.

#### **Subpart H—Retrocession**

##### **§ 29.700 May a Tribe retrocede a PSFA and the associated funds?**

A Tribe may voluntarily retrocede (fully or partially) its PSFA and the associated funds under a compact and funding agreement. A Tribe may retrocede for any reason.

##### **§ 29.701 How does a Tribe notify the Department of its intention to retrocede?**

(a) *Notice to the Department.* A Tribe must submit a written notice of its intent to retrocede to the Self-Governance Official to [ttsgp@dot.gov](mailto:ttsgp@dot.gov) or by any other method that provides receipt. The notice must specifically identify those PSFAs the Tribe intends to retrocede.

(b) *Notice to the Department of the Interior.* The Department will send the Tribe's notice of its intention to retrocede to the Department of the Interior and request that the Department of the Interior determine whether the PSFA is associated with transportation services provided by the Department of the Interior.

##### **§ 29.702 What happens if the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede?**

If the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede, the Department will notify the Tribe. The Tribe must return all remaining funds, less closeout costs, associated with those transportation services to the Department for transfer to the Department of the Interior.

**§ 29.703 What happens if the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede?**

If the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede, the Tribe may withdraw its notice to retrocede or return all remaining funds, less closeout costs, associated with the retroceded PSFA, and the Department will distribute those funds in accordance with applicable law.

**§ 29.704 When is the retrocession effective?**

The retrocession is effective within the time frame specified in the funding agreement. In the absence of a specified date, the retrocession becomes effective:

(a) On the earlier of 1 year after the date of the Tribe's submission of the request, or the date on which the funding agreement expires; or

(b) Such date mutually agreed upon by the Departments and the retroceding Tribe when the Department of the Interior has agreed to assume a retroceded PSFA.

**§ 29.705 What effect will a retrocession have on a Tribe's right to compact under the Program?**

Provided that a Tribe is eligible under § 29.100, retrocession will not adversely affect any future request by the Tribe to include funds from the same program in a compact or funding agreement.

**§ 29.706 Will retrocession adversely affect future funding available for the retroceded program?**

Retrocession will not adversely affect future funding for the retroceded program. Future funding will be available to the Tribe at the same level of funding as if there had been no retrocession.

## **Subpart I—Termination and Reassumption**

### **§ 29.800 When can the Department reassume a compact or funding agreement?**

The Department may terminate and reassume a compact or funding agreement (or portion thereof) when the Department makes a specific finding, in writing, to a Tribe, that the Department has found that there is:

(a) Imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement; or

(b) Gross mismanagement with respect to funds included in a funding agreement, as determined by the Department in consultation with the Office of the Inspector General, as appropriate. Gross mismanagement means a significant, clear, and convincing violation of compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for the PSFA carried out by the Tribe.

### **§ 29.801 Can the Department reassume a portion of a compact or funding agreement and the associated funds?**

The Department may reassume a portion of a compact or funding agreement and the associated funds if the Department has sufficient grounds to do so. The Department must identify the narrowest portion of the compact or funding agreement for reassumption.

### **§ 29.802 What process must the Department follow before termination of a compact or funding agreement (or portion thereof)?**

Except as provided in § 29.805, prior to a termination becoming effective, the Department must:

(a) Notify the Tribe in writing by any method that provides receipt of the findings required under § 29.800;

(b) Request specific corrective action within a reasonable period, no less than 45 days, to correct the conditions that may result in the Department's termination of a compact or funding agreement (or portion thereof);

(c) To the extent feasible and if requested, provide technical assistance to assist the Tribe in overcoming the conditions that led to the findings described under paragraph (a) of this section. Technical assistance may take the form of feedback, review, and other assistance requested, as appropriate; and

(d) Provide an opportunity for a hearing on the record in accordance with Subpart J of this part.

**§ 29.803 What happens if the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice?**

(a) If the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice, the Department must provide a second written notice by any method that provides receipt to the Tribe notifying it that the Department will terminate the compact or funding agreement, in whole or in part.

(b) The second notice must include:

(1) The effective date of the termination;

(2) The details and facts supporting the termination; and

(3) Instructions that explain the Tribe's right to a hearing pursuant to § 29.925.

**§ 29.804 When may the Department reassume?**

Except as provided in § 29.805, the Department may not reassume until 30 days after receipt of the notice, the final resolution of the hearing, or the resolution of any appeals, whichever is latest, to provide the Tribe with an opportunity to take corrective action in response to any adverse final ruling.

**§ 29.805 When can the Department immediately terminate a compact or funding agreement (or portion thereof)?**

(a) The Department may immediately terminate a compact or funding agreement (or a portion thereof) if:

(1) The Department makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and

(2) The jeopardy arises out of a failure to carry out the compact or funding agreement.

(b) The Department must provide notice of immediate termination by any method that provides receipt. The notice must set forth the findings that support the Department's determination, advise the Tribe whether it will be reimbursed for any closeout costs incurred after the termination, request the return of any property, and advise the Tribe of its right to a hearing pursuant to § 29.925. Concurrently, the Department must notify the Office of Hearings that the Department intends to immediately terminate a compact or funding agreement. Pursuant to 23 U.S.C. 207(f)(2)(E) and § 29.928, the Department has the burden of proof in any hearing or appeal of an immediate termination.

**§ 29.806 Upon termination, what happens to the funds associated with the terminated portions of the compact or funding agreement?**

Upon termination, the Department will reassume the remaining funds associated with the terminated portions of the compact or funding agreement. The Department may:

(a) Transfer funds associated with transportation services provided by the Department of the Interior to the Department of the Interior; or

(b) Distribute any funds not transmitted to the Department of the Interior in accordance with applicable law.

## **Subpart J—Dispute Resolution and Appeals**

### **§ 29.900 What is the purpose of this subpart?**

This subpart sets forth procedures that a Tribe may use to resolve disputes with the Department arising before or after the execution of a compact or funding agreement. It also sets forth the process for filing and processing administrative appeals under this part.

### **§ 29.901 Can the Department and a Tribe resolve disputes using alternative dispute resolution processes?**

At any time, the Department or a Tribe may request an informal process or an alternate dispute resolution procedure, such as mediation, conciliation, or arbitration, to resolve disputes. The goal of any such process (which may involve a third party) is to provide an inexpensive and expeditious mechanism to resolve disputes by mutual agreement instead of an administrative or judicial proceeding. The Department and the Tribe should resolve disputes at the lowest possible organizational level whenever possible.

### **§ 29.902 Does the Equal Access to Justice Act apply to the Program?**

The Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2414, and the relevant implementing regulations (48 CFR 6101.30 and 6101.31; 49 CFR part 6) will apply if the Tribe's compact or funding agreement make these provisions applicable.

### **§ 29.903 What determinations may not be appealed under this subpart?**

A Tribe may not appeal the following determinations under this subpart:

(a) *Waiver determination.* A waiver determination made pursuant to § 29.534 is a final agency action subject to judicial review under the Administrative Procedure Act.

(b) *Disputes or appeals arising under other Federal laws.* Decisions made under other Federal statutes, such as the Freedom of Information Act and the Privacy Act. Such decisions may be appealable under those statutes and their implementing regulations.

(c) *Selection and award decisions for discretionary or competitive grants.* The Department's selection and level of funding decisions for discretionary or competitive grants are not subject to appeal.

### ***Pre-Award Decisions***

#### **§ 29.904 What are pre-award decisions that a Tribe may appeal?**

A Tribe may appeal pre-award decisions, which include:

- (a) A decision whether to include a Department program in a funding agreement;
- (b) A decision whether an activity is an inherent Federal function;
- (c) A decision on a final offer before the Department and the Tribe enter into a compact or funding agreement;
- (d) A decision on a final offer before the Department and the Tribe execute an amendment modifying the terms of an existing compact or funding agreement; and
- (e) An eligibility determination.

#### **§ 29.905 To whom does a Tribe appeal a pre-award decision?**

A Tribe appeals a pre-award decision in accordance with the process in § 29.907 to a hearing official who was not involved in the initial decision and is appointed by the General Counsel of the Department.

**§ 29.906 Must a Tribe exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts for a pre-award decision?**

A Tribe must exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts, except a Tribe may appeal the rejection of a final offer directly to the U.S. District Courts in lieu of an administrative appeal.

**§ 29.907 When and how must a Tribe appeal a pre-award decision?**

(a) Unless a Tribe appeals, a pre-award decision becomes final 30 days after receipt by the Tribe. To appeal the pre-award decision, a Tribe must submit a written request to the Office of the General Counsel and the Self-Governance Official within 30 days of receiving the pre-award decision. The request must include a statement describing the reasons for appeal and any supporting documentation.

(b) The Tribe may request to resolve the dispute using an alternative dispute resolution process before the hearing official issues a decision.

**§ 29.908 May a Tribe request an extension of time to file an administrative appeal?**

If a Tribe needs additional time, it may request an extension of time to file an appeal of a pre-award decision. Within 30 days of receiving a decision, a Tribe must request the extension from the Office of the General Counsel, which has the discretion to grant the extension, and notify the Self-Governance Official of the request. The request must be in writing and give a reason for not filing its administrative appeal within the 30-day period. The Department may accept an appeal after the 30-day period for good cause.

**§ 29.909 When and how must the hearing official respond to the Tribe's appeal?**



(a) The hearing official must issue a decision in writing within 60 days of the receipt of the appeal. If the Tribe requests an informal hearing, the hearing official must issue a decision within 60 days of the hearing.

(b) All decisions issued by the hearing official must include a statement describing the rights of a Tribe to appeal the decision to the U.S. District Courts. The Department must provide the decision to the Tribe by any method that provides a receipt.

**§ 29.910 What is the Department’s burden of proof for appeals of pre-award decisions?**

The Department must demonstrate by clear and convincing evidence the validity of a pre-award decision, and that the decision is consistent with 23 U.S.C. 207.

**§ 29.911 What is the effect of a pending appeal on negotiations?**

A pending appeal of a pre-award decision will not prevent the Department from negotiating and executing the non-disputed, severable provisions of a compact or funding agreement or prevent the Department from awarding funds to the Tribe that may be included in a funding agreement.

***Post-Award Disputes***

**§ 29.912 What is a post-award dispute?**

A post-award dispute is a claim that arises under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101–7109. Such disputes arise once a compact or funding agreement is executed. Post-award disputes include:

- (a) Disputed interpretation of a provision of an executed compact or funding agreement;
- (b) Disallowance of costs under a funding agreement;

- (c) Suspension of payments under a funding agreement;
- (d) Allocation, distribution, or reduction of funds when a dispute arises between a consortium and a withdrawing Tribe;
- (e) Failure to comply with the terms of a funding agreement; and
- (f) Any other claim arising out of a compact or funding agreement.

**§ 29.913 What is a claim under the Contract Disputes Act?**

A Contract Disputes Act claim is a written demand filed by a Tribe that seeks one or more of the following:

- (a) Payment of a specific sum of money under the funding agreement;
- (b) Adjustment or interpretation of terms in a funding agreement;
- (c) Payment that is disputed as to liability or amount;
- (d) Payment that the Department has not acted upon in a reasonable time following a demand for payment; or
- (e) Any other claim relating to the terms of the compact or funding agreement.

**§ 29.914 How does a Tribe file a Contract Disputes Act claim?**

A Tribe must submit its claim in writing to the Self-Governance Official, who serves as the Department's awarding official for the purposes of Contract Disputes Act claims.

The Self-Governance Official will document the receipt of the claim.

**§ 29.915 Must a Tribe certify a Contract Disputes Act claim?**

A Tribe must certify a claim for more than \$100,000 in accordance with the Contract Disputes Act. The Tribe must certify that:

- (a) The claim is made in good faith;

(b) Documents or data supporting the claim are accurate and complete to the best of the Tribe's knowledge and belief;

(c) The amount claimed accurately reflects the amount the Tribe believes is owed; and

(d) The individual making the certification is authorized to make the claim on behalf of the Tribe and bind the Tribe with respect to the claim.

**§ 29.916 Who bears the burden of proof in a Contract Disputes Act claim?**

The Tribe bears the burden of proof to demonstrate, by a preponderance of the evidence, the validity of a Contract Disputes Act claim.

**§ 29.917 What is the Department's role in processing a Contract Disputes Act claim?**

(a) The Department must document the date that the Self-Governance Official received the claim.

(b) The Self-Governance Official must provide the Tribe with an opportunity to resolve the claim informally with assistance from Department officials who have not substantially participated in the disputed matter. Such informal mechanisms may include participating in dispute resolution pursuant to § 29.901.

(c) If the Department and the Tribe do not agree on a settlement, the Self-Governance Official must issue a written decision on the claim by any method that provides a receipt.

**§ 29.918 What information must the Self-Governance Official's decision contain?**

(a) The Self-Governance Official's decision must:

(1) Describe the claim or dispute;

(2) Reference the relevant terms of the compact or funding agreement;

(3) Set forth the factual areas of agreement and disagreement; and

(4) Set forth the Self-Governance Official's decision, and provide the facts and reasons that support the decision.

(b) The Self-Governance Official must provide the decision to the Tribe and describe the Tribe's appeal rights in language similar to the following:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 1800 F Street, N.W., Washington, D.C. 20245. If you decide to appeal, you must provide written notice within 90 days of receipt of this decision to the CBCA and provide a copy to the Self-Governance Official. The notice must indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the CBCA, you may bring an action in the U.S. Court of Federal Claims or U.S.

District Courts within 12 months of the date you receive this notice. If you do not appeal a decision within one of these time periods, it is not subject to further review.

**§ 29.919 When must the Self-Governance Official issue a written decision on the claim?**

(a) If the claim is for less than \$100,000, the Tribe may request that the Self-Governance Official issue a decision within 60 days of the date of receipt of the claim. If the Tribe does not request that the Self-Governance Official issue a decision within 60 days of the date of receipt of the claim, the Self-Governance Official must issue a decision within a reasonable time, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim. The Tribe must request a decision by the Self-Governance Official before seeking an appeal in accordance with paragraph (c) of this section.

(b) If the claim is for more than \$100,000, the Self-Governance Official must issue a decision within 60 days of the date of receipt of the claim or notify the Tribe of the time within which the Self-Governance Official will issue a decision. Such time frame must be reasonable, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim.

(c) If the Self-Governance Official does not issue a decision within these time frames, a Tribe may treat the delay as a denial of its claim and appeal the decision in accordance with § 29.921.

**§ 29.920 Is a decision of the Self-Governance Official final?**

(a) A decision of the Self-Governance Official is final and conclusive, and not subject to review, unless the Tribe timely commences an appeal or suit pursuant to the Contract Disputes Act.

(b) Once the Self-Governance Official issues a decision, the decision may not be changed except by agreement of the Department and the Tribe or under the following limited circumstances:

(1) Evidence is discovered that could not have been discovered through due diligence before the Self-Governance Official issued the decision;

(2) The Self-Governance Official learns that there has been fraud, misrepresentation, or other misconduct by a party;

(3) The decision is beyond the scope of the Self-Governance Official's authority;

(4) The claim has been satisfied, released, or discharged; or

(5) Any other reason justifying relief from the decision.

(c) If the Self-Governance Official withdraws a decision and issues a new decision, the Tribe may appeal the new decision in accordance with § 29.921. If the Self-Governance Official does not issue a new decision, the Tribe may proceed under § 29.919(c).

(d) If a Tribe files an appeal or suit, the Self-Governance Official may modify or withdraw the final decision before a decision is issued in the pending appeal.

**§ 29.921 Where may the Tribe appeal the Self-Governance Official's decision on a Contract Disputes Act claim?**

The Tribe may appeal the Self-Governance Official's decision on a Contract Disputes Act claim in one of the following forums:

- (a) The Civilian Board of Contract Appeals. The appeal must be in accordance with the Board's implementing regulations in 48 CFR part 6101;
- (b) The U.S. Court of Federal Claims; or
- (c) The U.S. District Courts.

**§ 29.922 May a party appeal a Civilian Board of Contract Appeals decision?**

A party may appeal a decision of the Civilian Board of Contract Appeals within 120 days to the U.S. Court of Appeals for the Federal Circuit.

**§ 29.923 What is the effect of a pending appeal?**

- (a) The Tribe must continue performance in accordance with the compact and funding agreement during the appeal of any claims to the same extent the Tribe would have performed had there been no dispute.

(b) A pending dispute will not affect or prevent the negotiation or award of any subsequent compact or funding agreement between the Department and the Tribe.

### ***Termination Appeals***

#### **§ 29.924 May a Tribe appeal the Department's decision to terminate a compact or funding agreement?**

A Tribe may appeal the Department's decision to terminate a compact or funding agreement to the Department's Office of Hearings.

#### **§ 29.925 Is a Tribe entitled to a hearing on the record?**

(a) The Department must provide a Tribe with a hearing on the record for a non-immediate termination prior to or in lieu of the corrective action period set forth in the termination notice as described in § 29.802.

(b) The Department must provide a Tribe with a hearing on the record for an immediate termination. The Department and the Tribe will work together to determine a mutually acceptable time and place for the hearing. The hearing on the record must commence no later than 10 days after the date of such termination or a later date upon mutual agreement. If feasible, the hearing may occur virtually or telephonically. If requested by the Tribe, the Department may arrange for an in-person hearing.

(c) A Tribe may decline a hearing in writing.

#### **§ 29.926 What rights do the Department and a Tribe have in an appeal of a termination decision?**

(a) During the appeal of a termination decision, the Department and a Tribe have the right to:

- (1) A designated representative;
  - (2) Present the testimony of witnesses, orally or in writing, who have knowledge of the relevant issues;
  - (3) Cross-examine witnesses;
  - (4) Introduce oral or documentary evidence, or both;
  - (5) Receive, upon request and payment of reasonable costs, a copy of the transcript of the hearing, and copies of all documentary evidence that is introduced at the hearing;
  - (6) Take depositions, request the production of documents, serve interrogatories on other parties, and request admissions; and
  - (7) Any other procedural rights established under the Administrative Procedure Act.
- (b) An administrative law judge assigned by the chief administrative law judge of the Department's Office of Hearings must conduct hearings on the record for a termination decision unless the Tribe waives the hearing.

**§ 29.927 What notice and service must the Department and the Tribe provide?**

- (a) The Department and the Tribe must file each document with U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.
- (b) The Department and the Tribe must serve copies of each document with:
- (1) The Self-Governance Official; and
  - (2) The authorized Tribal representative.

**§ 29.928 What is the Department's burden of proof for a termination decision?**

The Department must demonstrate by clear and convincing evidence the validity of the grounds for the termination.



**§ 29.929 How will the Department communicate its decision following a hearing on a termination decision?**

After the hearing or any post-hearing briefing schedule established by the Department's Office of Hearings, the administrative law judge must send the Department and the Tribe the decision by any method that provides a receipt. The decision must contain the administrative law judge's findings of fact and conclusions of law on all the issues.

**§ 29.930 May the Department or the Tribe appeal the decision of an administrative law judge?**

(a) The decision of an administrative law judge is a recommended decision that the Department or the Tribe may appeal to the Secretary.

(b) The decision of an administrative law judge becomes the final decision of the Secretary 60 days after it is served on the Department and the Tribe unless a petition for review is filed in accordance with § 29.931. The decision of the Secretary is a final agency action that the Tribe may appeal to the U.S. District Courts.

**§ 29.931 How can the Department or the Tribe obtain review of the recommended decision of an administrative law judge?**

(a) *Time for filing.* Within 30 days after service of any recommended decision of an administrative law judge, the Department or the Tribe may file a petition for review of the recommended decision with the Secretary. A copy must be served on the opposing party.

(b) *Service.* Each document filed with or by the Secretary must be accompanied by a certificate of service specifying the manner in which and the date on which service was made with the Secretary and the opposing party.

(c) *Form and content of objections.* The petition for review must set out separately and in detail each objection to the recommended decision, and the basis and reasons supporting such objection. The petition for review must state whether such objections are related to alleged errors of law or fact. The petition for review must also identify the relief requested.

(d) *Introduction of new information on review.* If the Department or the Tribe fail to object to any errors in the recommended decision, the party waives the right to allege such error in subsequent proceedings. The petition for review may not set forth for the first time on brief to the Secretary any matters of law or fact that were not argued before the administrative law judge.

(e) *Reply briefs.* An opposing party has 30 days from the date of service of the petition for review to file its reply brief.

(f) *Failure to file timely and adequate objections.* Late filed petitions for review are not permitted, and incomplete objections will not be reviewed.

#### **§ 29.932 May a Tribe appeal the decision of the Secretary?**

The decision of the Secretary on the merits of a petition for review constitutes final agency action. A Tribe may appeal the decision to the U.S. District Courts.

#### **§ 29.933 What is the effect of an appeal on negotiations?**

A pending appeal of a termination decision will not affect or prevent the award of another funding agreement or TTP Agreement. However, if the Department terminates

all or a portion of a compact or funding agreement due to a finding of gross mismanagement or imminent jeopardy that is sustained on appeal, and the Tribe has not corrected the adverse findings, the Department has discretion to reject a proposal to award the Tribe a new funding agreement or provide new funds in an existing funding agreement.

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